Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Customs and Patent Appeals and the United States Court of International Trade

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This issue contains

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 82-139)

Bonds

Approval and Discontinuance of Carrier's Bonds, Customs Form 3587

Bonds of carriers for the transportation of bonded merchandise have been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by figures in parentheses immediately following, which has been discontinued. If the previous bond was in the name of a different company or if the surety was different, the information is shown in a footnote at the end of the list.

Dated: July 29, 1982.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Aldershot Carry-All Service Ltd., 14 Plains Road West, Burlington, Ontario, Canada; motor carrier; Ins. Co. of North America	May 21, 1982	July 7, 1982	Buffalo, NY $25,000
Allstate Carriers, Inc., 2520 Berner St., Fort Worth, TX; motor carrier; United States Fire Ins. Co.	Mar. 25, 1982	July 13, 1982	Dallas/Fort Worth, TX $25,000
Applegate Drayage Co., Inc., 325 N. 5th St., Sacramento, CA; motor carrier; Royal Ins. Co. of America (PB 1/6/78) D 7/8/82 [1]	June 23, 1982	July 8, 1982	San Francisco, CA $25,000
Associated Freight Lines, 2403 Willow St., Oakland, CA; motor carrier; Peerless Ins. Co. D 7/7/82	Mar. 16 1982	Apr. 20, 1982	San Francisco, CA $25,000
CVS Leasing Ltd.—See Transterm Express, Inc.			
Distribution Technology, Inc., dba: PDC Trucking, P.O. Box 7123, Charlotte, NC; motor carrier; Firemen's Ins. Co. of Newark, NJ	July 2, 1982	July 16, 1982	Wilmington, NC $25,000

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Douglas Trucking Co., South Highway 75, P.O. Box 698, Corsicana, TX; motor carrier; Washington International Ins. Co.	July 2, 1982	July 8, 1982	Dallas/Fort Worth, TX $25,000
Express Transterm Inc.—See Transterm Express Inc.			
G.E.O. Motor Express, Inc., 104 Main St., Topsham, ME; motor carrier; Liberty Mutual Ins. Co.	June 1, 1982	July 8, 1982	Portland, ME $25,000
Golden Coast Forwarding Ltd., 3600 S. Western Ave., Chicago, IL; motor carrier; The Commercial Union Ins. Co.	May 20, 1982	July 6, 1982	Chicago, IL $50,000
Greater Miami Air Freight, Inc., 7795 N.W. 32 St., Miami, FL; motor carrier; St. Paul Fire & Marine Ins. Co. D 8/7/80	July 10, 1979	July 13, 1979	Miami, FL $50,000
H.M.D. Transport, Inc., 370 West First St., South Boston, MA; motor carrier; Peerless Ins. Co.	Jan. 11, 1982	July 13, 1982	Boston, MA $25,000
International Liquid Transport, Inc., 18281 Colville St., Fountain Valley, CA; motor carrier; St. Paul Fire & Marine Ins. Co.	July 1, 1982	July 7, 1982	Los Angeles, CA $50,000
Lagniappe Trucking, Inc., 8470 Morrison Rd., New Orleans, LA; motor carrier; Fidelity & Deposit Co. of MD	June 29, 1982	June 29, 1982	New Orleans, LA $25,000
LeRoy K. Trucking Co., Inc., 99 Evergreen Ave., Newark, NJ; motor carrier; Peerless Ins. Co.	June 23, 1982	July 1, 1982	New York Seaport $200,000
M & M Farm Lines, Inc., Rt. #1, Bertand, MO; motor carrier; The Travelers Indemnity Co.	June, 16, 1982	July 6, 1982	St. Louis, MO $50,000
Mercury Transportation, Inc., 8502 Miller Rd., No. 3, Houston, TX; motor carrier; Fidelity & Deposit Co. of MD	June 21, 1982	July 7, 1982	Houston, TX $50,000
Montreal Container Terminals Inc.—See Transterm Express Inc.			
Old Dominion Freight Line, Inc., P.O. Box 2006, High Point, NC; motor carrier; Aetna Casualty & Surety Co. (PB 7/16/79) D 7/16/82 [2]	July 16, 1982	July 16, 1982	Norfolk, VA $50,000
PDC Trucking—See Distribution Technology, Inc.			
Pyramid Van Lines, Inc.—See Towne Van Lines, Inc.			
Rosedale Transport Ltd., 161 Brockley Dr., P.O. Box 363, Hamilton, Ontario, Canada; motor carrier; Royal Ins. Co. of America	July 1, 1982	July 6, 1982	Buffalo, NY $25,000

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
George Smith Trucking, Ltd., 1975 Brookside Blvd., Winnipeg, Manitoba, Canada; motor carrier; The American Ins. Co. (PB 5/29/73) D 7/8/82 [3]	June 4, 1982	July 8, 1982	Pembina, ND $25,000
Southern Warehouse & Cartage, Inc., 7210 N.W. 77th St., Miami, FL; motor carrier; Fidelity & Deposit Co.	Mar. 17, 1982	May 18, 1982	Miami, FL $25,000
Mr. James H. Edwards, dba: Tejano Line, 2858 Cresthaven, P.O. Box 172, Grapevine, TX; motor carrier; United States Fidelity & Guaranty Co.	June 15, 1982	July 13, 1982	Dallas/Fort Worth, TX $25,000
Towne Van Lines, Inc.; Towne Services Leasing Co. of El Paso, Inc.; Towne Services Leasing Co. of Killeen, Inc.; Towne Services Leasing Co. of San Antonio, Inc.; Towne Services Leasing Co. of Austin, Inc.; Towne International Forwarding, Inc. of San Antonio; motor carrier; Mid-Century Ins. Co. (PB 12/23/77) D 7/13/82 [4]	July 6, 1982	July 13, 1982	Laredo, TX $25,000
Trans Canada Truck Lines Inc., 5425 Dixie Rd., Mississauga, Ontario, Canada; motor carrier; Ins. Co. of North America	May 17, 1982	July 6, 1982	Buffalo, NY $40,000
Transport Robert (1973) Ltd., 130 1st Ave., Rougemont, P.Q., Canada; motor carrier; Transamerica Ins. Co. (PB 5/12/80) D 7/12/82 [5]	June 7, 1982	July 13, 1982	Ogdensburg, NY $25,000
Transterm Express Inc./Express Transterm Inc., and CVS Leasing Ltd.; motor carrier; The Continental Ins. Co. (PB 10/8/80) D 7/15/82 [6]	June 30, 1982	July 16, 1982	Ogdensburg, NY $50,000
Transx Ltd., Box 36, Group 200–RR2, Winnipeg, Manitoba, Canada; motor carrier; Transamerica Ins. Co.	June 2, 1982	July 12, 1982	Pembina, ND $25,000
Wills Trucking, Inc., 3185 Columbia Rd., Richfield, OH; motor carrier; St. Paul Fire & Marine Ins. Co. D 7/14/82	June 21, 1979	July 3, 1979	Cleveland, OH $50,000
Wilmington Express, Inc., P.O. Box 540, Wilmington, NC; motor carrier; Great American Ins. Co. D 7/13/82	June 4, 1979	June 14, 1979	Wilmington, NC $25,000
Worster Motor Lines, Inc., R.D. #1 Gay Rd., North East, PA; motor carrier; Fidelity & Deposit Co. of MD D 2/11/82	Oct. 3, 1978	Oct. 9 1978	Buffalo, NY $25,000

[1] Principal is Applegate Drayage Co.; Surety is Mid-Century Ins. Co.
[2] Principal is Old Dominion Freight Lines; Surety is Peerless Ins. Co.
[3] Surety is The Continental Ins. Co.
[4] Principal is Pyramid Van Lines, Inc., Towne Services Leasing Co. of El Paso, Inc.; Towne Services Leasing Co. of Killeen, Inc.; Towne Services Leasing Co. of San Antonio, Inc.; Towne International Forwarding, Inc.; Surety is Hartford Accident & Indemnity Co.
[5] Surety is The Continental Ins. Co.
[6] Principal is Montreal Container Terminals Inc. & CVS Leasing Ltd.

BON-3-03

MARILYN G. MORRISON,
Director,
Carriers, Drawback and Bonds Division.

(T.D. 82-140)

Reimbursable Services—Excess Cost of Preclearance Operations

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., August 4, 1982.

Notice is hereby given that pursuant to Section 24.18(d), Customs Regulations (19 CFR 24.18(d)), the biweekly reimbursable excess costs for each preclearance installation are determined to be as set forth below and will be effective with the pay period beginning August 8, 1982.

Installation	Biweekly excess cost
Montreal, Canada	$20,922
Toronto, Canada	28,894
Kindley Field, Bermuda	10,023
Nassau, Bahama Islands	15,140
Vancouver, Canada	11,588
Winnipeg, Canada	2,689
Freeport, Bahama Islands	9,784
Calgary, Canada	7,448
Edmonton, Canada	3,893

WILLIAM H. RUSSELL,
Comptroller.

[Published in the Federal Register Aug. 9, 1982 (47 FR 34482)]

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., August 3, 1982.

The following are decisions made by the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the Customs Bulletin.

JOHN P. SIMPSON,
Director,
Office of Regulations and Rulings.

(C.S.D. 82-101)

This ruling holds that interest payments, made by the buyer to the seller which are part of an overall financing arrangement are not part of the price actually paid or payable for the imported merchandise.

Date: December 17, 1981
File: CLA-2 CO: R:CV:V
542627 TLL
TAA No. 43

This is in reply to your letter dated October 5, 1981, concerning the dutiability of interest payments.

You state that your client has been an importer of graphic arts equipment for many years. As part of its arrangements with its suppliers, your client is authorized to delay its payment for its importations for a period of 90 days from the date of F.O.B. shipment. In consideration for this separate undertaking by its suppliers to extend credit for a period of 90 days for the purchased merchandise, your client separately undertakes a commitment to pay interest at a specified rate for the credit period. This separate undertaking permits them to avoid the need to seek alternative inventory financing sources for their importations, but it does not release the client from an obligation to pay interest for that financing service.

In addition, you have indicated verbally that the financial arrangement bears no relationship to a particular sale and that by contract the supplier has the right to renegotiate the rate of interest if the going rate of interest changes sufficiently. In sum this ar-

rangement is quite similar to a credit arrangement for a revolving charge account.

Under these circumstances, it appears to us that this type of separate financing arrangement, fully documented as being separate from the import transaction, is not part of the price actually paid or payable for the imported merchandise and we so hold.

In short, we are saying that in those situations where interest payments are made by the buyer to the seller as part of an overall financing arrangement between the parties, they are not part of the total payment made by the buyer to the seller for the merchandise within the meaning of section 402(b)(4)(A) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979.

(C.S.D. 82-102)

This ruling holds that an aircraft which transports U.S. Geological Survey personnel between a drilling vessel attached to the outer continental shelf and the U.S. mainland is not required to give advance notice of intended arrival to Customs under Section 6.2(b) of the Customs Regulations.

Date: February 24, 1982
File: VES-5-05-CO:R:CD:C
105473 PH

To: Regional Commissioner of Customs, Los Angeles, California 94105.

From: Director, Carriers, Drawback and Bonds Division.

Subject: Requirements for Passengers and Cargo Arriving on the United States Mainland from a Drilling Vessel Attached to the Outer Continental Shelf.

In its letter of January 4, 1982 (copy attached), the United States Geological Survey (U.S.G.S.) brought to our attention your letter to its Los Angeles regional office (File: INS-1-0:I CK, December 7, 1981) in which you stated that all crew and visitors to the foreign-flag vessel (vessel name) operating for (Corp.) outside the 12 mile limit are required to report to Customs upon arrival in the Customs territory. The U.S.G.S. requests that we provide it with a citation to the regulations which require this and an exemption from this requirement for its technicians which inspect the vessel.

For purposes of this memorandum, we assume that the aircraft used to transport the U.S.G.S. personnel is a United States-registered aircraft. If this is not so, please advise us, as there could be a violation of the air cabotage laws (49 U.S.C. 1508(b)) in that case.

Section 6.2(b), Customs Regulations (19 CFR 6.2(b)), requires that "[a]ll aircraft * * * before coming into any area from any place outside the United States * * * shall furnish a timely notice of intended arrival."

Section 4 of the Outer Continental Shelf Lands Act, as amended (43 U.S.C. 1333), provides, in part, that the Constitution and laws of the United States are extended to the subsoil and seabed of the outer continental shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, to the same extent as if the outer continental shelf were an area of exclusive Federal jurisdiction located within a State. Under the authority of this provision, Customs has ruled that Customs and navigation laws, including the coastwise laws, the laws on entrances and clearances of vessels, and the provisions for dutiability of merchandise, are extended to mobile rigs during the time they are secured to or submerged onto the seabed of the outer continental shelf for drilling operations (T.D. 54281). Because a drilling vessel is required, by law, to be treated as though it were an area of exclusive Federal jurisdiction within a State during the time it is attached to the outer continental shelf, an aircraft coming to a point on the United States mainland from such a drilling vessel would not be required to give advance notice of its intended arrival to Customs under section 6.2(b), Customs Regulations. By the same token, an aircraft coming to a drilling vessel attached to the outer continental shelf from outside the United States would be required to give advance notice of its intended arrival.

A drilling vessel which is not attached to the outer continental shelf (e.g., moving between drilling sites) would not be treated as though it were an area of exclusive Federal jurisdiction within a State. Thus, an aircraft coming from such a drilling vessel would have to give advance notice of its intended arrival and an aircraft coming to such a drilling vessel from a place outside the United States would not have to give advance notice of its intended arrival.

The laws relating to the entry and clearance of vessels have been made applicable to civil aircraft pursuant to 49 U.S.C. 1509(b) and (c). Accordingly, the Customs Service has ruled that a United States-registered aircraft, with foreign merchandise for which entry has not been made on board, arriving on the United States mainland from a drilling vessel on the outer continental shelf would be required to make a report of arrival at the nearest customhouse within 24 hours, pursuant to 19 U.S.C. 1433. This would be true whether or not the drilling vessel were attached to the outer continental shelf when the aircraft left it. Therefore, if the aircraft returning the U.S.G.S. personnel to the mainland from the drilling vessel has on board unentered foreign merchandise, the aircraft will be required to report arrival at the nearest customhouse within 24 hours.

In summary, an aircraft which transports U.S.G.S. personnel between a drilling vessel attached to the outer continental shelf and

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the United States mainland is not required to give advance notice of intended arrival to Customs under section 6.2(b), Customs Regulations. Advance notice of intended arrival would be required if the drilling vessel were not attached to the outer continental shelf (e.g., moving between drilling sites) when the aircraft left the drilling vessel. If the aircraft has on board unentered foreign merchanidse, report of arrival at the nearest customhouse within 24 hours will be required in any event.

In your December 7, 1981, letter to the Los Angeles U.S.G.S. regional office, you referred to "the 12 mile limit." The territorial waters of the United States, which are the outward limit of the Customs territory of the United States, except as provided under the Outer Continental Shelf Lands Act, as amended, do not extend beyond the belt, 3 nautical miles wide, adjacent to the coast of the United States and seaward of the territorial sea baseline (T.D. 78–440).

Attached is a copy of our letter responding to the letter from the U.S.G.S. referred to above. As you will note, we have informed that office that we have reviewed this matter and sent our findings to you. Please advise the local office of the U.S.G.S. accordingly.

In a telephone conversation with Mr. Paul Hegland of my staff, Mr. Charles King of your staff noted that the treatment of this subject in the Carrier Control Handbcok (Vessels), July 31, 1981, (see section 3111.15) is somewhat confusing. Thank you for bringing this to our attention. The Carrier Rulings Branch in this Division is presently reviewing that Handbook and will take Mr. King's comments into consideration in its review.

(C.S.D. 82–103)

This ruling holds that equipment, used in the production of motor vehicles in a foreign trade zone, will not become dutiable in the subzone as production equipment until it is completely assembled, installed, tested and used in full-scale production of motor vehicles.

Date: March 4, 1982
File: FOR–2–04–CO:R:CD:D
213999 RB

Issue: When does merchandise brought into a foreign-trade zone become dutiable as production equipment?

Facts: A company intends to operate a foreign-trade subzone for the production of motor vehicles. The machinery which will be used in the subzone to produce the motor vehicles will consist of a highly automated integrated system of industrial robots, automated conveyor and stamping systems and a complex computerized interface.

In its proposed final configuration, it is uncertain as to whether the machinery, as a fully integrated unit, will be capable of full-

scale production of motor vehicles in the subzone. To determine this, it will be necessary initially to bring the machinery into the subzone to be assembled, installed and tested. As a result of these ongoing operations, some or all of the machinery, which will arrive in the subzone in partial shipments extending over a period of several months, may be returned to the manufacturers, replaced, redesigned or scrapped as useless.

Law and analysis: Section 3 of the Foreign-Trade Zones Act of 1934 (FTZA), as amended, 19 U.S.C. 81c, provides generally that merchandise of every description may be brought into a zone free of duty. By way of exception, merchandise which constitutes production equipment is not merchandise under the FTZA and thus may not be brought into a zone free of duty (see C.S.D. 79–418).

However, based upon the facts set forth in the foregoing section, we conclude that the machinery involved herein will not become dutiable in the subzone as production equipment until it is completely assembled, installed, tested and used in full-scale production of motor vehicles in the subzone. Until that time the machinery involved herein may be considered merchandise under the FTZA and, as such, may be brought into the subzone free of duty.

Holding: The machinery involved herein will not become dutiable in the subzone as production equipment until it is completely assembled, installed, tested and used in full-scale production of motor vehicles in the subzone.

(C.S.D. 82–104)

This ruling holds that the cost of extended warranties on imported automobiles is part of the consideration paid for the automobiles and is, therefore, part of the price actually paid or payable and dutiable under the transaction value basis of appraisement.

Date: March 10, 1982
File: CLA–2 CO:R:CV:G
542699 BS

Gentlemen:

Re: Ruling Request—Warranty Charges.

This is in response to your letter of December 11, 1981, in which you request a ruling with regard to the dutiability of certain warranty charges.

Background: You advise that your client ("Buyer") is contemplating the importation of automobiles into the United States which will be covered by an extended warranty from the manufacturer-seller ("Seller"). The normal warranty period offered by Seller is 24 months or 24,000 miles, whichever comes first. Under the terms of the extended warranty Buyer will purchase an additional warranty period of 12 months or 12,000 miles, whichever comes first, for an approximate cost of 300 DM, which will be separately invoiced. The

normal or "usual" warranty of 24 months or 24,000 miles, will continue to be included as part of the purchase price of the automobiles. Appraisement of the automobiles has been on the basis of transaction value.

Issue: Whether the charges paid for the extended warranty are dutiable under the transaction value basis of appraisement, Trade Agreements Act of 1979 (TAA).

Argument: In your opinion, the extended warranty cost is a charge that accrues subsequent to the time when the merchandise is in the principal market, in condition, packed ready for shipment to the United States; that such charge is not a "usual" charge and should not be treated as additional consideration for the imported merchandise, but rather is incidental to the import transaction; and that such services should be included within the ". . . costs, charges or expenses incurred for transportation, insurance and related services . . .", which costs are excluded from the definition of "price actually paid or payable", under transaction value.

Law and analysis: Section 402(b)(1) provides that the transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States, plus amounts equal to certain additional costs, not here pertinent. Section 402(b)(4)(A) provides that the term "price actually paid or payable" means the total payment (whether direct or indirect, and exclusive of any costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise from the country of exportation to the place of importation in the United States) made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller.

While the dutiability of warranty charges under the TAA has not been the subject of a prior ruling or judicial decision, we have previously characterized a warranty as "an undertaking in praesenti that the merchandise will be free from defects. If it is not, the manufacturer is responsible for rectification of those defects. The warranty is something which is integral with and attached to the merchandise itself in its condition as imported, and, as such, it is dutiable under constructed value." ORR Ruling 76-0072 (File 72-024488), dated July 15, 1976.

In that ruling we held that the warranty was not an after-sales service contract (in response to the importer's claim that the charges were for services performed after exportation), but rather was a "guarantee that the manufacturer will produce a product free from defects, and that obligation can be completely satisfied by producing a product free from defects." We also held that warranty costs were a general expense. (In that case, therefore, under the constructed value basis of appraisement, the issue was whether the particular warranty cost was a "usual" general expense. We held that it was.)

While the body of case law and administrative rulings arising under the prior value laws is not necessarily applicable to the TAA, the general principles of warranty set forth in the cited ruling are instructive here.

Applying these principles to the instant case, we find that the warranty costs, whether paid for the "usual" 24 months, 24,000 mile warranty, or for the "usual" warranty plus the "extended" warranty, do not accrue after the merchandise is in condition, packed ready for shipment to the United States, but rather attach to, and are an integral part of, the merchandise upon its importation. Thus, it follows that the consideration paid for the merchandise, *i.e.,* the "price actually paid or payable", must include all charges paid for any warranty which is a guarantee that the merchandise will be free from defects. (We are, of course, assuming that transaction value will be the proper basis of appraisement.)

Under the circumstances, we find that the involved warranty attaches to and is an integral part of the imported merchandise, and that the payment made for this warranty is part of the consideration paid for the merchandise. Thus, such charge is part of the "price actually paid or payable" and is dutiable under the transaction value basis of appraisement.

(C.S.D. 82-105)

This ruling holds that a foreign-built U.S.-registered fish processing vessel is not precluded from landing in the U.S., fish caught by U.S.-documented harvesting vessels.

Date: March 16, 1982
File: VES 7-03/VES 7-02
CO:R:CD:C
105283 HS

This ruling concerns the use of a foreign-built, U.S.-registered fish processing vessel to process and then land in the United States fish caught by U.S. harvesting vessels which are owned in part and managed by one of the owners of the processing vessel.

Issue: Is a foreign-built, U.S.-registered fish processing vessel precluded from landing in the U.S. fish caught by U.S.-documented taking vessels which are owned in part and managed by one of the owners of the processing vessel?

Facts: A foreign-built vessel placed under U.S. registry will operate within the United States Fishery Conservation Zone. The vessel will receive the catch of U.S. harvesting vessels outside the three mile limit, at which point the catch will be processed and subsequently transported by the vessel and landed in a United States port. The vessel will not engage in coastwise transportation. In addition, the vessel may remain stationary in a U.S. port adjacent to a dock or pier where it will receive fish caught by U.S. vessels or

will receive previously landed fish for processing and then dispatch the fish at that port.

The processing vessel is owned by a limited partnership comprised of two corporate general partners and three limited partners. One of the corporate general partners is entirely owned by an individual who is a majority or minority owner in certain of the harvesting vessels, is the president of a company which owns and/or manages harvesting vessels and whose wholly-owned subsidiary controls the operation of all the harvesting vessels. In terms of the processing vessel, this general partner, under the terms of the partnership agreement, will be primarily responsible for the purchase by the vessel of fresh caught fish to be delivered at sea from harvesting ships and for marketing the vessel's frozen products.

The other general partner will be primarily responsible for, among other things, supervising the operation of the processing vessel, including crewing, chandlering, discharging of product, stationing of the vessel at sea for delivery of fish, maintenance and repairs.

Law and analysis: To be employed in "fishing" a vessel of the United States pursuant to section 4.96(c), Customs Regulations, may be enrolled and licensed, or licensed, depending upon its size, or registered. If registered, the vessel must be entitled to be licensed or enrolled and licensed for the fisheries. Licensing or enrollment is predicated upon U.S. construction of a vessel.

Section 4.96(a)(4), Customs Regulations, provides that "the term 'fishing' means the planting, cultivation, or taking of fish, shell fish, marine animals, pearls, shells, or marine vegetation, or the transportation of any of these marine products to the United States by the taking vessel or other vessel under the complete control and management of a common owner or bareboat charterer."

Reading section 4.96(c) and section 4.96(a)(4) together, it appears that a vessel registered in the United States, but not built in the United States is prohibited from transporting marine products to the United States that were transshipped to it by harvesting vessels if the processing vessel is under the complete control of management of an owner who also owns the harvesting vessels. The reasoning for this would be that the transporting vessel would be considered to be engaged in "fishing."

The petitioner argues that to preclude a foreign-built, U.S.-registered fish processing vessel from transporting to the United States marine products taken by a vessel under the complete control and management of a common owner does not further the objectives of the Customs Regulations, and is inconsistent with the intent of Congress to enable foreign-built, U.S.-registered processors to operate in the Fishery Conservation Zone and land fish transferred to them on the high seas in the United States.

We do not find it necessary to analyze this contention as we do not find "complete control and management of a common owner"

in this instance. There is no question that if "complete control and management of a common owner" is not present, only the harvesting vessel can be considered to be engaged in the fisheries. The transfer of fish from harvesting vessels to a processing/transporting vessel interrupts the fishing operation so that the transporting vessel is engaged merely in the movement of merchandise and stands on the same footing in this regard as a cargo vessel.

In this case, there is an individual who entirely owns a company which is one of the general partners owning the processing vessel, is part owner of certain harvesting vessels and is owner and president of the company that owns and manages the harvesting vessels. This individual, however, does not have *complete* control of the processing vessel. In fact, the other general partner of the processing vessel is primarily responsible for supervising the daily operation of the vessel.

Holding: As the processing/transporting vessel and the harvesting vessels are not "under the complete control and management of a common owner or bareboat charterer," the processing vessel will not be considered to be engaged in fishing. The processing vessel is, therefore, not precluded from landing in the U.S. fish caught by the U.S.-documented harvesting vessels.

(C.S.D. 82–106)

Transaction Value: The amount required to be paid to a supplier out of an importer's net profits on resale of certain merchandise, as computed under a contractual agreement, are proper additions to the transaction value of the imported merchandise pursuant to section 402(b)(1)(E), Trade Agreements Act of 1979.

Date: March 29, 1982
File: CLA-2 CO:R:CV:G
542729 BS

Dear Mr. (Name):

Re: (Company Name), Request for Ruling.

This is in response to your letter dated January 25, 1982, regarding the above-captioned matter.

Issue: The primary issue involved is whether certain remissions made by the importer to the seller reflecting net profits from resale in the United States are includable under transaction value as part of "the proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller" within the meaning of section 402(b)(1)(E) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA).

Background: The importer ("Importer") is a distributor of wines and spirits, acting on its own behalf as a reseller and also on behalf of other consignees. Under a contractual agreement effective on

the 10th of November 1978 ("Agreement"), Importer and one of its suppliers ("Supplier") entered into an arrangement for the purchase and distribution by Importer of a particular liquor ("X Vodka").

Pursuant to the Agreement, the Supplier grants to Importer, for an initial period ending March 31, 1982, and subject to renegotiation and further agreement for additional three-year periods thereafter, the sole and exclusive right to purchase and import X Vodka after resale in the tax-paid and duty-free markets in the United States, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.

In consideration of this exclusive distributorship, Importer agrees to make payment for importations of X Vodka at established "initial net prices", based on production costs to Supplier, FOB Port of origin. Supplier cannot change those prices without substantiating production cost changes of at least 5 percent in writing to Importer, three months prior to the effective date of any change. In addition, Importer is obligated to remit to Supplier one-half (50 percent) of the excess of importer's revenues from the resale of X Vodka to its customers above the sum of importer's "net cost" (the FOB price, if sold FOB; FOB plus freight, if sold CIF; and FOB plus freight, taxes and warehouse charges, if sold tax-paid in the United States), plus the initial "selling costs" incurred by Importer within the United States.

Under the terms of the Agreement, Importer estimates such selling costs in accordance with a specific formula as reflected in the background data, at fixed amounts for the life of the Agreement, subject to periodic changes only in circumstances where Importer fully substantiates, in writing to Supplier, changes in costs of at least 5 percent, three months before the effective date of such changes. (Under the formula, selling cost is arrived at by adding the total general, administrative and selling costs of all wines and spirits sold by Importer, less any costs directly attributed to particular brands divided by total cases of all wines and spirits sold by Importer, multiplied by the total number of cases of the product sold by Importer.)

You advise that in practice, importer changes such selling costs annually, based primarily on anticipated inflation rates and total projected sales volumes. This formula affords the basis for attributing unit selling costs to each case of X Vodka imported under the Agreement.

Importer's revenues from resale of X Vodka are also fixed at prices which it must publish in compliance with the laws of the states in which it is licensed to sell, and such published prices are utilized to determine its revenues for purposes of the Agreement.

It is your opinion that the amounts required to be paid to Supplier out of importer's net profits on resale of X Vodka, as computed

under the Agreement, are proper additions to the transaction value of the imported merchandise pursuant to section 402(b)(1)(E), TAA.

Law and analysis: Section 402(b)(1)(E), TAA, provides, in part, that the transaction value of imported merchandise is the price paid or payable for the merchandise when sold for exportation to the United States, plus amounts equal to—

> "(E) the proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller,"

An addition to transaction value will be made only where there is information sufficient to establish the accuracy of such addition. If an addition cannot be made on the basis of such information, the transaction value cannot be determined. See section 402(b)(1), and the Statement of Administrative Action.

It is apparent from the Agreement that Importer is obligated to remit directly to Supplier part of the proceeds of its resale of X Vodka. Further, such amounts are based upon revenue and cost data, and an appropriate methodology which provides an accurate means for determining that portion of the proceeds from the subsequent resale that will be payable to Supplier.

Holding: Under the circumstances, we hold that the amounts required to be paid by Importer to Supplier out of Importer's net profits on resale of X Vodka, as computed under the Agreement, are proper additions to the transaction value of the imported merchandise as proceeds of a subsequent resale that accrue directly to the seller.

Classification: The imported merchandise is dutiable on a specific quantity basis, not on an ad valorem basis. Since X Vodka is imported in bottles which hold less than one gallon, and on a gallon basis the unit price (which includes the addition under transaction value) exceeds $7.75 per gallon (as per your exhibit B), it is your opinion that X Vodka is properly classifiable under item 169.38, Tariff Schedules of the United States (TSUS), vodka valued over $7.75 per gallon.

We agree with your analysis. Since the price of X Vodka exceeds $7.75 per gallon, the imported merchandise should be classified under item 169.38, TSUS, and dutiable at the rate of $1.06 per proof gallon.

(C.S.D. 82-107)

This ruling holds that the use of transaction value does not impede the instant case. The price actually paid or payable is known at the time of exportation; and if the price of the product should increase subsequent to importation due to a change in the resale price in the United States, then the amount remitted be-

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comes the proceeds of any subsequent resale. Accordingly, transaction value is the proper basis of appraisement.

Date: March 30, 1982
File: CLA-2 CO:R:CV:V
542746 BS

To: District Director of Customs, Ogdensburg, New York 13669.

From: Director, Classification and Value Division.

Subject: Internal Advice Request No. 182/81.

This is in reference to your memorandum dated November 3, 1981, regarding the above-captioned matter.

Issue: Is transaction value precluded from use where the proceeds of a subsequent resale which accrue to the foreign seller cannot be quantified at the time of exportation?

Background: The imported merchandise ("Product"), is a chemical used for certain medical purposes. After importation, it is subject to certain additional processing and then sold by the importer ("Importer") under a trademarked name, "X." It is our understanding that the processing essentially involves changing the Product from bulk to tablet form and certain packaging, as per conversation with Import Specialist Bunin, March 9, 1982.

Pursuant to an agreement between the foreign seller ("Seller") and Importer, a base price is paid for the merchandise, which is subject to change depending upon changes in the selling price of the Product in the United States. The method for determining the final price for the Product is set forth under Paragraph (3) of the Amendment to the basic Agreement as follows:

> (3) The price which shall apply to sales of the Product to you shall with effect from January 1, 1980, be determined as follows:
>
> (a) If at anytime you vary (either upwards or downwards) the price at which you sell the Product in final packaged form (other than in respect of formulated Product which you have purchased from us) you will notify us.
>
> (b) From the date of the selling price change referred to in subparagraph (a) the price which at the time of such change applies to sales of the Product to you will be varied by the same percentage as the variation in your weighted average selling price consequent on the selling price change referred to in subparagraph (a).
>
> (c) The price of the Product as varied pursuant to subparagraph (b) will be applied to your inventory of the Product in bulk, as bulk in the course of formulation and as bulk in final package for at the date of the variation in your selling price. You will as soon as possible provide us with details of your inventory as aforesaid and with your calculations of bulk Product contained therein and a corresponding payment will be made within 30 days of the notification unless payment by you to us for any part thereof

has not been received; in such a case you will adjust your payment to us for that part of your inventory.

(d) For the purposes of this letter, the variation in your weighted average selling price will be the difference, expressed as a percentage, between—

(i) The actual total dollar sales of formulations containing the Product sold by you to customers during the previous three (3) months; and

(ii) The said total sales with the substitution of the varied price of the formulation or formulations concerned for the price which actually prevailed for that formulation or formulations during that period.

Thus, under the terms of the Agreement, the price of the Product will increase or decrease depending on price increases or decreases on the sale of "X" by Importer in the United States. Another provision of the Agreement provides for a floor price of $100 a kilo, subject, however, to change by mutual agreement of the parties. The Agreement does not provide for any period of time in which increases or decreases in price must be effective. Importer advises that such changes could occur more than one year after importation of the Product, and yet affect all of the Product in Importer's inventory. For example, if Importer imports a kilo of Product for $150 on January 1, 1980, and on January 1, 1981, elects to decrease its sale price for "X" to its U.S. customers by 5 percent, the purchase price of the kilo would be retroactively reduced by that percentage to a sale price of $142.50 per kilo. On the other hand, if Importer increases the price for "X" by 5 percent, the price for the Product would be increased to $157.50 per kilo on all merchandise in bulk or in final packaged form and inventory. Obviously, for this method to function properly, Importer must keep appropriate records to account for all of the Product in its inventory on any given date.

Law and analysis: Section 402(b)(1), TAA, provides in pertinent part that the transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States, plus certain additions. One of these additions is—

"(E) The proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller."

Section 402(b)(2)(A) provides, in part, that transaction value is applicable only if—

"(ii) The sale of, or the price actually paid or payable for, the imported merchandise is not subject to any condition or consideration for which a value cannot be determined with respect to the imported merchandise;

(iii) No part of the proceeds of any subsequent resale, disposal, or use of the imported merchandise by the buyer will

accrue directly or indirectly to the seller, *unless an appropriate adjustment therefore can be made under paragraph (1)(E).*" Emphasis added.

Section 402(b)(4)(B) provides that "Any rebate of, or other decrease in, the price actually paid or payable that is made or otherwise effected between the buyer and seller after the date of importation of the merchandise into the United States shall be disregarded in determining transaction value."

The Importer contends that the price actually paid or payable cannot be known until the merchandise is sold to Importer's customers in the United States, subsequent to importation. Therefore, under section 402(b)(2)(A)(ii), the merchandise is subject to a condition for which a value cannot be determined. Further, Importer argues that transaction value is also precluded by section 402(b)(2)(A)(iii), since the proceeds of the subsequent resale in the United States accure to the benefit of the seller. In the Importer's opinion, the exception under this subparagraph does not apply because no adjustment can be made at the date of exportation to the price to reflect proceeds due the seller. Transaction value cannot apply unless the price can be quantified at the time of exportation.

In addition, the Importer compares the instant situation to that of a consignment transaction, which may not be appraised under transaction value since it is "subject to a condition or consideration for which a value cannot be determined * * *." Finally, the Importer points out that the application of transaction value will lead to an inequitable result if the Importer's price to its U.S. customers decreases, thus causing a decrease in the price paid to the foreign seller. Under section 402(b)(4)(B), *supra,* an amount equal to the decrease could not be substracted from entered value since that provision disregards rebates or other decreases in the price paid or payable made after the date of importation.

Holding: We see no impediment in the instant case to the use of transaction value. The statute requires that there be a price actually paid or payable for the merchandise when sold for exportation to the United States plus certain additions if applicable. Here, the price actually paid or payable, unlike that of a consignment transaction, is known at the time of exportation; it is the base price agreed upon by the parties. If the price of the Product is increased subsequent to importation due to a change in the resale price in the United States, then the amount remitted becomes the "proceeds of any subsequent resale." To hold that the addition must be quantifiable at the time of exportation, as the Importer urges, would be inconsistent with commercial reality and with the clear intent of the statute.

The law and regulations thereunder do require that the "proceeds of any subsequent resale" must be based upon information sufficient to establish the accuracy of the addition. Here, there is a specific method under the Agreement for quantifying the addition

to be made. An analogous situation is set forth under section 152.103(g), Customs Regulations. In that example, "a buyer contracts to import a new product. Not knowing whether the product ultimately will sell in the United States, the buyer agrees to pay the seller initially $1.00 per unit with an additional $1.00 per unit to be paid upon the sale of each unit in the United States. Assuming the resale price in the United States can be determined in a reasonable period of time, the transaction value of each unit would be $2.00. Otherwise, the transaction value could not be determined for want of sufficient information."

We see no conceptual difference between that example and the situation in the instant case. Further, while we agree that the law does not provide for any decrease in the price actually paid or payable effected between the buyer and the seller after importation (section 402(b)(4)(B), above, specifically precludes such treatment), the statute clearly provides for certain additions to that price, including the addition for proceeds from a subsequent resale. Legislative intent may be inferred from reading those provisions as an entirety. We also assume, and the facts do not reflect otherwise, that the proceeds from the subsequent resale can be determined within a reasonable period of time.

Under these circumstances, we find that transaction value is the proper basis of appraisement.

(C.S.D. 82-108)

Transaction Value: This decision holds that merchandise imported under a trade fair entry, then transferred to a Foreign Trade Zone, then sold in the United States, is properly appraised on the basis of deductive value.

Date: March 31, 1982
File: CLA-2 CO:R:CV:V
542748 BLS

To: District Director of Customs, Charleston, South Carolina 29402.

From: Director, Classification and Value Division.

Subject: Internal Advice No. 16/82.

This is in reference to your memorandum dated January 18, 1982, regarding the above-captioned matter.

Issue: Whether merchandise imported under a trade fair entry, transferred to a foreign trade zone (FTZ), and then sold in the United States may be appraised under transaction value, section 402(b), Trade Agreements Act of 1979 (TAA).

Background: A textile finishing machine was imported in October of 1980 by the Manufacturer's selling agent under a trade fair entry and was used for testing and demonstration. Subsequently, the machine was entered into an FTZ as non-privileged foreign

merchandise. No processing or assembly took place in the FTZ. It was sold in the United States in June of 1981 and withdrawn from the FTZ at that time. While the original invoice bringing the merchandise into the United States reflected a value of $117,500, the price of the machine to the U.S. purchaser was $65,000, duty paid, free trade zone.

Position of District Director, Charleston: The District Director is of the opinion that the merchandise should be appraised under section 402(f) at the original invoice price of $117,500 less depreciation of 15 percent, packed.

Position of Chief, Duty Assessment, New York Seaport: This Customs officer would appraise the merchandise under section 402(b), at $65,000, less actual duty included, packed.

Law and analysis: Under section 146.48(e), Customs Regulations, non-privileged foreign merchandise shall be subject to appraisement in accordance with its character and condition at the time of its constructive transfer to the Customs territory, and, except for any different rates applicable to any privileged foreign merchandise thereon, to the rate or rates of duty and tax in force at the time of entry for consumption or withdrawal from warehouse for consumption is made. The value of non-privileged foreign merchandise shall be determined in accordance with section 402, Tariff Act of 1930, as amended. (However, certain costs incurred in the zone, *e.g.,* fabrication and general expenses and profit, are excluded from dutiable value.)

Pursuant to section 402(b), TAA, the transaction value of imported merchandise is the "price actually paid or payable" for the merchandise *when sold for exportation to the United States,* plus certain additions not here applicable. Emphasis added.

In the instant case, the merchandise was not sold for exportation to the United States, but was consigned to the importer until sold in the United States. Therefore, there was no "price actually paid or payable when sold for exportation to the United States" and no transaction value. The fact that the merchandise entered an FTZ after importation into the United States (initially under a trade fair entry) does not in any way negate the proper application of section 402, TAA. Therefore, we find that transaction value, section 402(b), is inapplicable.

Since section 402(b) can not be used, the appraising officer must consider the secondary bases of appraisement, *i.e.,* transaction value of identical or similar merchandise, deductive value, computed value, or the "Value if Other Values Cannot be Determined or Used." While the record only reflects that deductive value is not applicable, because of the statutory time limitations contained therein, the appraising officer, by using section 402(f), has apparently found that none of the other specific bases of appraisement are applicable.

Assuming the Customs officer has properly eliminated all of the bases of appraisement except section 402(f), it is our view that since the transaction would be appraised under section 402(d), deductive value, were it not for the time limitations contained therein (see section 402(d)(2)(A)(ii)), the appraised value should reflect the methods used under this basis of appraisement, with reasonable adjustments. Thus, the appraised value should reflect the price at which the merchandise is sold in the United States, *i.e.*, $65,000, reduced by Customs duties, international freight and insurance, etc. (see section 402(d)(3)(A)).

(C.S.D. 82-109)

This ruling holds that tobacco scrap, tobacco stems, and tobacco dust and dirt all of which cannot be used as tobacco and which lack any other use except remanufacture into tobacco sheet or tobacco rag are considered valuable waste under 19 U.S.C. 1202.

Date: April 6, 1982
File: CON-9-04-CO:R:CD:D
214044 R

Issues: 1. Whether the term "articles" used in the headnotes to part 5c, Schedule 8, Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202) includes the term "by-products"?

2. Whether the term "wastes" used in the headnotes to Part 5c, Schedule 8, TSUS, (19 U.S.C. 1202) is synonymous with the term "by-products"?

3. Whether tobacco scrap, tobacco stems, and tobacco dust mixed with dirt, all of which cannot be used for any purpose without extensive processing, are articles or valuable wastes for temporary importation under bond purposes?

4. Whether an opinion expressed in published notes that were prepared for a Customs seminar is a decision or ruling?

Facts: Temporarily imported green leaf tobacco, redried leaf tobacco, and strips of threshed tobacco are to be blended, and also may be threshed, with domestic tobacco. Redried leaf tobacco and strips are produced from the processing and will be exported.

This processing also creates three commodities which cannot be used for any purpose without additional processing: tobacco scrap, tobacco stems, and tobacco dust mixed with dirt. Tobacco scrap is a piece of leaf lamina which passes through a ⅛-inch screen but stays on top of a 1/32-inch screen. Tobacco stems are stem pieces which vary in length from mere particles to pieces ½-inch long. Tobacco dust mixed with dirt consists of non-tobacco substances and tobacco dust collected from the processing plant and pieces of leaf lamina which passed through a 1/32-inch screen.

Tobacco stems which are over ¼-inch long may be processed by being rolled flat and then cut up to make a product known as tobacco rag. All other stems must be processed by being ground and

used to make a product known as tobacco sheet. Stems over ¼-inch long also can be ground and used to make tobacco sheet. Tobacco dust mixed with dirt is subjected to a floatation process to remove non-tobacco substances. Then the purified tobacco dust is used to make tobacco sheet. Tobacco scrap is ground and used to make tobacco sheet. It is understood that tobacco sheet resembles paper and is made by employing machinery similar to Fourdrinier machines used by the paper-making industry. It has been proposed to treat these three commodities as valuable wastes and enter them into the United States commerce on tender of any applicable duty. After admission, the importer will sell these commodities to a person who will make them into tobacco sheet.

Law and analysis: Item 864.05, Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202), allows the temporary importation under bond of merchandise for processing. The Item is qualified by the headnotes to Part 5c, Schedule 8, TSUS (19 U.S.C. 1202). Until the Act of December 28, 1980, Pub. L. 96–609, Sec. 105, 94 Stat. 3555, all articles and valuable wastes resulting from that processing were required to be exported or destroyed under Customs supervision within the bond period. That Act changed that requirement by allowing valuable wastes from the processing to be entered into United States commerce on tender of applicable duty. The requirement for exportation or destruction of any article produced was continued.

Thus, the first question is whether the term "article" includes "by-product". The second question is whether "by-product" and "valuable waste" are synonymous. The third question is what term encompasses the three described commodities. The fourth question concerns an administrative law matter.

The terms "articles," "by-products," and "waste" are tariff terms, although "by-product" is not specifically mentioned in the relevant headnotes. As tariff terms, they are construed generally in accordance with common meaning. Sturm, *A Manual of Customs Law,* 202 (1974) and cases cited therein. In order to determine that meaning, courts have used dictionaries. *Trans-Atlantic Company* v. *U.S.,* 60 CCPA 100, 102, CAD 1088, 471 F. 2d. 1397 (1973); *Con. Edison Co.* v. *Dept. of Local Government,* 408 NE 2d 263, 267, 86 ILL Appl 3d 768, 41 ILL. Dec. 841 (1980); and *Patton* v. *U.S.,* 159 U.S. 500, 503 (1895).

Websters Third New International Dictionary (1971 unabgd. ed) defines article as—

> * * * 3a: A particular item of business. * * * 5a: One of a particular class of material things. * * * b. A piece of goods: commodity. * * *

It defines by-product as—

> A secondary or additional product: Something produced (as in manufacturing) in addition to the principal product.

It defines waste as—

> Damaged, defective, or superfluous material produced during or left over from a manufacturing process or industrial operation: material not usable for the ordinary or main purpose of manufacture: as (1) material rejected during a textile manufacturing process and either recovered for reworking (as yarn) or used usually for wiping dirt and oil from hands and machinery.

When used in the tariff statutes it is clear that Congress intended different meanings for by-products and waste. For example, the first proviso to section 311, Tariff Act of 1930, as amended (19 U.S.C. 1311), which concerns processing in bonded manufacturing warehouses, allows by-products and waste from cleaning rice to be withdrawn for domestic consumption on payment of duty. The second proviso to that section allows all waste to be destroyed under Customs supervision. Section 313, Tariff Act of 1930, as amended (19 U.S.C. 1313) requires distribution of drawback if more than one article was produced as a result of the use of imported merchandise in a manufacturing process. The courts have construed this latter provision to require distribution of drawback to by-products, which clearly indicates that the term "article" includes by-products.

In the case of *Campbell* v. *U.S.*, 107 U.S. 407, 2 Sup. Ct. 759 (1882), the court held that linseed cake, which was produced along with linseed oil by the pressing and mulling of linseeds, was an article entitled to drawback. In *U.S.* v. *Dean Linseed-Oil Co.*, 87 F. 453 (2nd Cir. 1898), the court held that linseed cake, although a secondary product compared to linseed oil, was entitled to drawback as a by-product. The court rejected the Government's contention that the linseed cake was a waste and not entitled to drawback. It reasoned that unlike waste which it said was something only fit for a new manufacture, linseed cake was a recognizable article of commerce as the sole or main ingredient of livestock feed. See also *National Lead Company* v. *U.S.*, 252 U.S. 140, 40 Sup. Ct. 237 (1920), which dealt with the same issues and approved the *Dean Linseed-Oil Co.* case, and *Kilburn Mill* v. *U.S.*, 2 Cust. Ct. 203, CD 124 (1939); aff'd 27 CCPA 374 (1940) which dealt with by-products of cotton manufacture relating to drawback.

There have been a number of cases in which the differences between by-products and wastes were discussed. In *Willits* v. *U.S.*, 11 Cust. Appls. 499, T.D. 39657 (1923), there is a discussion on the differences among manufactured articles, raw materials, and wastes. The *Willits* court categorized waste as having neither the qualities of the starting raw materials or the qualities of an article that is sought or purposely produced. The distinction between by-products and wastes was at issue in *Ishimitsu Co.* v. *U.S.*, 12 Cust. Appls. 477, T.D. 40672 (1925). The Government contended that nigari, a secondary product in Japanese salt production, was a by-product.

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The court found that nigari was not the product of any manufacturing effort designed to produce it as a primary product or as an equally valuable by-product. It found nigari to be a thrown-off incident of salt production whose only use was to be used in the manufacture of tofu, a food product. In *Koons, Wilson & Co.* v. *U.S.,* 12 Cust. Appls. 418, T.D. 40589 (1924), the reasoning of the *Willits* court was applied to beet pulp, which was the dried residue from sugar beets after the sugar was extracted. The court found that the residue was dried and ground and used for cattle food. Similar reasoning was applied in *Darling & Co. (Inc.)* v. *U.S.,* 12 Cust. Appls. 86, T.D. 40023 (1924), and (S.D.N.Y. Cir. 1904), *Gudewill & Bucknall* v. *U.S.,* 142 F. 214 (S.D.N.Y. Cir. 1904). The cases of *Standard Varnish Works* v. *U.S.,* 59 F. 456 (2nd Cir. 1894) and *American Smelting & Refining Co.* v. *U.S.,* 12 Cust. Appls. 212, T.D. 40226 (1924) concerned new articles that were chemically different from the original raw materials and which had specific uses in their own rights. Also in the *American Smelting* case, the court noted that the commodity in issue was specifically sought for its own value. See also *U.S.* v. *David Studner,* 57 CCPA 122, CAD 990, 427 F. 2d. 819 (1970)); *U.S.* v. *Salomon,* 1 Cust. Appls. 246, T.D. 31277 (1911); *Salomon Bros. & Co. et al.* v. *U.S.,* 2 Cust. Appls. 431, T.D. 32196 (1912); and *Mawer-Gulden-Annis (Inc.)* v. *U.S.,* 17 CCPA 270, T.D. 43689 (1929).

Finally, there are a number of cases dealing with tobacco products and waste. In *Sheldon* v. *U.S.,* 55 F. 818 (7th Cir. 1893), the court held that tobacco scraps which were broken from the wrappers and fillings during the manufacture of cigars and were put aside to be used to make snuff, cigarettes, and cheaper cigars were not waste. In *Seeberger* v. *Castro,* 153 U.S. 32 (1894), it had been stipulated by the parties that the pieces of tobacco were not fit for any use in their condition as imported and that their only use was to be manufactured into cigarettes and smoking tobacco. The court found that the tobacco clippings were mere waste resulting from a process of manufacture and not in themselves manufactured articles, but classified them in another more specific tariff provision. In *U.S.* v. *Schroeder,* 93 F. 448 (2nd Cir. 1899), the court followed the reasoning expressed in *Seeberger* v. *Castro,* supra, and held such tobacco scraps to be waste. In *Latimer* v. *U.S.,* 223 U.S. 501 (1912) the court found that the tobacco involved retained the name and quality of tobacco. Also it appears to have found that unlike the commodities here, the tobacco there could be used as collected to make cigarettes and stogies. In *Spaulding* v. *Castro,* 153 U.S. 38 (1894) the court held unobjectionable a jury instruction in which the court said that if the jury found that the tobacco was required to have labor expended on it in order to make it fit for consumption, the tobacco was not classifiable as a manufactured article.

Accordingly, described tobacco scrap, stems, and dust are waste rather than by-products.

It is argued that the Customs Service must follow certain conclusions which were set forth in published notes on a Customs drawback seminar.

Section 552(a)(1)(A) of the Administrative Procedure Act (5 U.S.C. 552(a)(1)(A)) requires each Federal agency to publish in the Federal Register for the guidance of the public the employees from whom and the methods whereby the public may obtain decisions. Pursuant to that statute, the Customs Service published Customs Delegation Order No. 1 (Revision 1) in the Federal Register on May 27, 1969 (34 F.R. 8208) (T.D. 69–126). That order informed the public that decisions relating to legal questions about entry of articles under Part 5c, Schedule 8, TSUS (19 U.S.C. 1202) could be obtained from the Director, Division of Carriers, Drawback and Bonds. When the title of the unit was changed to its present configuration, Carriers, Drawback and Bonds Division, the public was informed of that change by T.D. 72–321, which was published in the Federal Register on November 25, 1972 (37 F.R. 25060). The seminar notes published in 1975 were not issued by the Director, Carriers, Drawback and Bonds Division (the correct title of the employee since T.D. 72–321).

Part 177 of the Customs Regulations (19 CFR Part 177) sets forth the methods whereby the public may obtain decisions from employees such as the Director, Carriers, Drawback and Bonds Division. The notes in question were prepared in connection with the conduct of a seminar rather than as a decision under the procedures in 19 CFR Part 177. Inasmuch as they were not prepared as a decision under 19 CFR Part 177 and were not issued by the only employee authorized by the Customs Service to issue decisions on that subject, the notes cannot be consider a decision of the Customs Service.

Holdings: 1. The term "articles" used in the headnotes to Part 5c, Schedule 8, TSUS (19 U.S.C. 1202) encompasses "by-products."

2. The term "by-products" and "wastes" are not synonomous for purposes of temporary importation under bond.

3. Tobacco scrap, tobacco stems, and tobacco dust and dirt, as described in this ruling, all of which cannot be used as tobacco and which lack any other use except remanufacture into tobacco sheet or tobacco rag constitute valuable waste rather than an article under Part 5c, Schedule 8, TSUS (19 U.S.C. 1202).

4. Seminar notes which were not issued by an authorized employee and which were not issued under the procedures set forth in 19 CFR Part 177 are not decisions of the Customs Service.

(C.S.D. 82–110)

Temporary Importation Under Bond (TIB): Spare parts admitted under TIB as replacement parts for equipment admitted under a separate TIB and not used or tested during the bonded period may

be timely exported without violating the bond. A defective part associated with equipment imported under a specific TIB may be replaced with a spare part imported under a second TIB without violating either TIB.

Date: April 9, 1982
File: CON-9-CO:R:CD:D
214100 L

Issues: 1. May spare parts be admitted temporarily free of duty under bond (TIB), not be used or tested during the bond period, and subsequently be exported without violating the bond?

2. May a defective part associated with equipment imported under a specific TIB be replaced with a spare part imported under another TIB without violating either TIB?

Facts: Imported equipment is entered under TIB and incorporated with other equipment into a complete system and subsequently exported. Spare parts for the equipment are also imported, generally under a separate TIB.

Generally, defective parts removed from equipment covered by one TIB entry are replaced with identical parts covered by another TIB entry. Exportation of the defective part or parts is used to cancel a portion of the spare parts TIB and exportation of the complete system containing the spare part or parts is used to cancel a portion of the equipment TIB. A substantial quantity of the imported spare parts are not needed and are timely exported without being used.

Law and analysis: We assume TIB entry of both the equipment and spare parts is made under item 864.05, Tariff Schedules of the United States (TSUS), although the following would apply to entries under item 864.30, TSUS, as well.

Parts imported to repair the equipment whether actually used or tested may be admitted under item 864.05, TSUS, as articles to be altered and/or processed. Similarly, parts of articles imported under item 864.30, TSUS, are entitled to entry under that law when imported after the entry of the principal article if necessary for the experimental use of the principal article.

A defective part in equipment imported under a specific TIB may be replaced with a spare part imported under a separate TIB. The obligation under the bond is to export or destroy the particular articles covered by the entry and no others. For that reason, as a general proposition, substitution is not allowed.

Further, a TIB entry cannot be canceled in part by exportation of part but not all of the articles admitted under that TIB. The TIB entry covering the imported equipment cannot be canceled until all of the articles covered by that TIB, including the defective part, have been timely exported or destroyed as provided by the law and regulations. The TIB entry covering spare parts cannot be canceled until all of the articles covered by that TIB, including the part

placed in the imported equipment as a replacement, have been exported or destroyed.

Holding: 1. Spare parts admitted under TIB as replacement parts for equipment admitted under a separate TIB and not used or tested during the bonded period may be timely exported without violating the bond.

2. A defective part associated with equipment imported under a specific TIB may be replaced with a spare part imported under a second TIB without violating either TIB. The first TIB may not be canceled until all of the articles covered by that TIB, including the defective part that was removed, have been timely exported or destroyed. The second TIB may not be canceled until all of the articles covered by that TIB, including the part used as a replacement in the article covered by the first TIB, have been timely exported or destroyed.

United States Court of International Trade

Decisions of the United States Court of International Trade

(Slip Op. 82-54)

SCM CORPORATION, PLAINTIFF *v.* THE UNITED STATES, DEFENDANT; BROTHER INTERNATIONAL CORPORATION, PARTY-IN-INTEREST

Court No. 77-4-00553

Before BERNARD NEWMAN, *Judge.*

Memorandum and Order on Cross-Motions for Summary Judgment

[SCM's renewed motion for summary judgment denied; renewed cross-motions by defendant and the party-in-interest granted.]

(Decided July 15, 1982)

Frederick L. Ikenson, Esq., for the plaintiff.

J. Paul McGrath, Assistant Attorney General (*David M. Cohen*, Director, Commercial Litigation Branch, and *Sheila N. Ziff*, Esq.) for the defendant.

Tanaka Walders & Ritger, Esqs. (*H. William Tanaka* and *Wesley K. Caine*, Esqs., of counsel) for the party-in-interest.

BERNARD NEWMAN, *Judge*.

I

Background

This action, brought under 19 U.S.C. § 1516(c) (1976) by SCM Corporation (SCM), a domestic portable typewriter manufacturer, is again before the Court following my remand to, and the responsive Statement of Reasons by, the United States International Trade Commission ("Commission") in *Portable Electric Typewriters From Japan*, U.S.I.T.C. Public 732, Investigation No. AA1921-145 (40 FR 27079 (1975)). Plaintiff has contested the Commission's negative determination of injury made on June 19, 1975 under the Antidumping Act of 1921, as amended (19 U.S.C. § 160 *et seq.*) [1], and now before the Court is the Commission's new Statement of Reasons dated September 23, 1981. The history of this protracted case is summarized in my prior decision of July 1, 1981 remanding the action to the Commission,[2] and that background will be reiterated here only to the extent necessary for discussion of the remaining issues raised by the parties.

Briefly, my order of July 1, 1981 stayed the proceedings and specified that the Commission: (a) supply this Court with a more specific and explict Statement of Reasons in compliance with the prior remand order entered by Chief Judge Re on March 7, 1980 [3] (with which order the Commission had not complied); (b) reconsider and advise this Court whether there was price suppression; and (c) make and report a specific finding of fact as to whether there were lost sales as a consequence of market penetration by the Japanese less than fair value (LTFV) imports.

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[1] The Commission determined, by a vote of three to two with one abstention, that an industry in the United States is not being or likely to be injured or prevented from being established by reason of portable electric typewriters from Japan sold at less than fair value within the meaning of the Antidumping Act, as amended. Chairman Leonard and Commissioners Bedell and Parker determined in the negative, while Commissioners Moore and Ablondi determined in the affirmative. Vice-Chairman Minchew abstained from voting. Chairman Alberger, Vice-Chairman Calhoun, and Commissioners Bedell and Stern provided the statement on remand. Thus, of the three Commissioners composing the majority voting negatively, only Bedell remained on the Commission and participated in the proceedings on remand.

[2] 2 CIT —, Slip Op. 81-57, 519 F. Supp. 911 (July 1, 1981).

[3] See 84 Cust. Ct. 227, C.R.D. 80-2, 487 F. Supp. 96 (1980).

On October 1, 1981 defendant filed with the Court the "Statement of the U.S. International Trade Commission in Compliance with Remand Order", dated September 23, 1981. This statement was approved and signed by all of the members of the Commission. In its statement of September 23, 1981 the Commission explained: (1) why it concluded that the facilities of SCM for producing manual typewriters could not be considered as a separate industry for purposes of the injury investigation; (2) why it would not predicate an affirmative determination of injury on significant market penetration standing alone; (3) why it could not find price suppression; and (4) why the record fails to support a finding of significant lost sales by reason of the LTFV imports.

In short, on remand the Commission has reexamined the record before it and provided this Court with a new Statement of Reasons. The central issue is whether the Commission's negative injury determination is correct in light of the reasons advanced in its initial and new Statement of Reasons and the record before the Commission. Presently before the Court are Plaintiff's renewed motion for summary judgment and the renewed cross-motions for summary judgment by defendant and the party-in-interest. For the reasons expressed herein, plaintiff's renewed motion is denied, and the renewed cross-motions by defendant and the party-in-interest are granted. Accordingly, the Commission's negative injury determination is affirmed.

II

Opinion

A. *Commission's Compliance With Remand Order*

Initially, plaintiff contends that the Commission's statement of September 23, 1981 fails to comply with either the "letter or the spirit" of the second remand order (dated July 1, 1981), and that the Commission's statement is logically and factually unsupportable. Specifically, plaintiff argues that the Commission's new statement constitutes merely "*post hoc* rationalizations" of the Commission's initial determination, and manifests an "institutional commitment" to defend the original determination rather than a genuine reconsideration of the issues. These contentions must be rejected.

The remand orders required more specific and explicit explanations for certain conclusions reached by the Commission in its orignal Statement of Reasons. In their new statement, the Commissioners advised that they had "carefully reviewed the [administrative] record" when they acted in compliance with the remand order; and plainly, the Commission's response manifests an objective and good faith effort to merely articulate the reasoning behind the conclusions previously reached by the Commission and questioned by the Court. Except to the extent that my remand order required the

Commission to make additional findings of fact, the Commission was required to do nothing more than elaborate on certain conclusions previously reached in its original Statement of Reasons. Clearly, the Commission's new statement did not recast any of the reasons articulated in its original statement, and the orders of remand did not oblige the Commission to arrive at a different substantive result. *CF. Sprague Electric Company* v. *United States (Capar Components Corp., Party-in-Interest),* 84 Cust. Ct. 243, C.R.D. 80–3, 488 F. Supp. 910 (1980), in which the action was remanded to the Commission expressly for reconsideration and a new determination by the Commissioners serving at that time. See also the remand to the Secretary of Labor for administrative reconsideration in *R. E. Abbott et al.* v. *United States Secretary of Labor,* 2 CIT—, Slip Op. 82–12 (February 11, 1982).

In sum, plaintiff's contentions that the Commission has failed to comply with the Court's remand orders and that the Commission's new statement comprises *post hoc* rationalizations are without merit. However, the question remains whether, in light of the Commission's original Statement of Reasons and its new findings of fact and clarifications, the negative injury determination should be sustained.

It is now settled law that the sole standard of review of factual determinations of injury or likelihood of injury in antidumping cases is whether the Commission's determination is supported by substantial evidence. *Armstrong Bros. Tool Co., et al.* v. *United States,* 67 CCPA 94, C.A.D. 1252, 626 F.2d 168 (1980). Moreover, in reviewing an injury determination under the Antidumping Act, the Court may not weigh the evidence concerning specific factual findings, nor may the Court substitute its judgment for that of the Commission. *Sprague Electric Company* v. *United States (Capar Components Corp., Party-in-Interest),* 1 CIT—, Slip Op. 81–120, 529 F. Supp. 676 (1981), and cases cited.

B. *Scope of the Affected Domestic "Industry"*

We turn to the issue of industry scope. The Commission's statement on remand aptly points out that in any determination of injury under the Antidumping Act a necessary first step is to define the scope of the domestic industry against which the impact of LTFV imports is to be measured. In its original Statement of Reasons, the Commission majority stated in pertinent part:

> In this case the imported articles found to be sold at LTFV by the Treasury and the imported articles covered by the Commission's notice of investigation are portable electric typewriters. However, with regard to what is the industry most likely to be affected by the subject imported articles, we have considered whether that industry is, in the alternative, the facilities devoted to the production of all portable typewriters (both electric and manual) or the facilities devoted to the production of only portable electric typewriters. In either instance the indus-

try is the U.S. facilities of SCM Corporation, the sole U.S. producer of portable electric and portable manual typewriters.

Plaintiff argued in support of its original motion for summary judgment that the Commission erred as a matter of law when it failed to consider a third alternative industry—the domestic production facilities for portable manual typewriters. The Court's remand orders required the Commission to supply a more specific and explicit Statement of Reasons for its conclusion relating to the scope of the affected domestic industry.

In the new statement on remand, the Commission submitted its reasons for the original approach taken to the question of industry scope. To summarize, the Commission explained:

1. That portable electric typewriters, as distinct from portable manual typewriters, were the subject of the less-than-fair-value determination;

2. That "[t]he domestic industry producing articles of a like class or kind [portable electric typewriters] competes most directly with and is most likely to be affected by LTFV imports"; SCM is the sole U.S. producer of portable electric typewriters, and therefore, "[t]he core consideration * * * is the effect of the imports on SCM's facilities devoted to the production of portable electric typewriters";

3. That SCM also manufactures portable manual typewriters, and the record indicates that LTFV imports of low-end portable electric typewriters may compete with manual portables produced by SCM and may affect their sales. Consequently, it was appropriate for the Commission to alternatively consider SCM's entire facilities for the production of portable typewriters, both manual and electric, in assessing injury;

4. That the information of record indicates SCM enjoyed a "dominant position in the U.S. market for portable typewriters", and SCM's production facilities were of such a nature that SCM could change the mix of its products (*i.e.*, the mix of portable electrics and portable manuals) in response to changing market trends and consumer preferences; and

5. That while "the inter-relationship of facilities devoted to the production of both kinds of portables may justify extension of the Commission's examination to include the production of manuals in addition to electrics, it in no way suggests viewing the facilities producing manuals as a separate industry", for purposes of the proceeding at hand.

Significantly too, the Commission additionally noted:

> Moreover, imports of portable manual typewriters, which were neither alleged nor found to have been sold at LTFV, averaged 1,451,000 units per year during 1971–74 and accounted for about 91.5 percent of apparent U.S. consumption of these

> articles * * *. Thus, if the segment of SCM's business producing portable manual typewriters suffered injury, the injury was probably attributable to its inability to compete with fair value imports of manual units and not to LTFV imports of portable electric typewriters from Japan.

The Commission's new statement on remand adequately articulates its reasons for the alternative industry approach employed in the original Statement of Reasons, and for not trifurcating the domestic industry in the manner advanced by plaintiff.[4] I find these reasons to be rational and its findings supported by substantial evidence. Further, it is to be noted that prior to the enactment of the Trade Agreements Act of 1979, the Commission had broad discretion in delineating the relevant domestic industry against which it was required to assess the effects of LTFV imports inasmuch as the term "industry" was not defined in the Antidumping Act of 1921. The Commission's approach to industry scope in this case was well within its broad discretion.

C. *Market Penetration by LTFV Imports*

In its original Statement of Reasons, the Commission majority acknowledged that the LTFV imports from Japan had obtained a significant share of the domestic market for portable typewriters during the period of the Treasury investigation (October 1973–March 1974), but posited that "[i]mport penetration alone is not an adequate basis for determining injury". The Commission majority explained that none of the other tests of injury applied in this case showed injury to the domestic injury, but to the contrary such tests indicated that the domestic industry (viz, SCM) had prospered and was likely to continue expanding.

In its new statement, the Commission has, at the direction of the Court, further elaborated upon its view that market penetration alone is an insufficient basis for an affirmative finding of injury.

The Commission's new statement on remand cites the facts that the affected domestic industry in this case is represented by a single large firm (SCM) that has no domestic competitors and holds a dominant position in the United States market; that during the period covered by the investigation (1971–74) SCM showed improved performance in all indices of the health of the industry; and that the Commission's view respecting market penetration is consistent with prior Commission precedent. Further, the Commission observed:

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[4] Chief Judge Re rejected a similar explanation by *Government counsel* as being "at best, a *post hoc* rationalization". See 84 Cust. Ct. at 242. It is a fundamental principle of administrative law that the *post hoc* rationalizations of Government counsel may not be relied upon to uphold agency action. *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168–69 (1962). However, Chief Judge Re's previous *rejection* of the *post hoc* rationalizations by Government counsel has no application to the similar explanation in the Commission's remand statement since that explanation was provided in compliance with this Court's orders requiring a more specific statement of reasons.

> In view of the expanding and increasingly profitable business of the single domestic producer, the mere fact of significant import penetration is not by itself capable of demonstrating injury. This is even more the case since the data show that import penetration dropped sharply in the last year for which information was collected.

And apparently recognizing that the market penetration issue posed by the Court's remand raises essentialy a question of law, the Commission stated:

> If increasing penetration alone were adequate to show injury, such a conclusion could be reached by a computer, negating the need for the conceived scheme of economic analysis, and *weighing of all factors* such as production, shipments, capacity utilization, employment and profitability by a collegial body of human beings. [Emphasis added.]

I fully agree with the Commission's rejection of what in essence amounts to a *per se* injury rule based upon significant market penetration.[5] In *Armstrong Bros. Tool Co., et al.* v. *United States (Daido Corporation, Steelcraft Tools Division, Party-in-Interest),* 84 Cust. Ct. 16, C.D. 4838, 483 F. Supp. 312, *aff'd.,* 67 CCPA 94, C.A.D. 1252, 626 F.2d 168 (1980), this Court emphasized the complex multifaceted economic and financial analysis involved in making an injury determination under the Antidumping Act and the broad discretionary authority vested in the Commission. Hence, although significant market penetration by the LTFV imports is obviously a highly relevant factor, the Commission has the descretion—indeed an obligation—to consider and weigh a number of other pertinent economic and financial criteria, and consider all the facts and circumstances, including the health of the domestic industry. That approach is precisely what the Commission followed in this case, eschewing any *per se* injury rule predicated upon significant market penetration.

In view of *Armstrong,* there is now a judicially approved explanation as to the reason why no single economic or financial factor necessarily constitutes injury within the contemplation of the Antidumping Act. Therefore, quite apart from the Commission's rationale expressed in its new Statement of Reasons, the question of law raised on remand pertaining to significant market penetration has been judicially answered in agreement with rationale applied by the Commission.

Plaintiff's arguments are directed essentially at the relative weight and significance the majority Commissioners accorded to the various factors considered (including market penetration), and

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[5] Plaintiff maintains that it does not advance a *per se* injury rule based on significant market penetration. Rather, plaintiff argues that when there is significant market penetration due to underselling the domestic product, "it must be inferred that the domestic industry lost sales and was thereby injured by reason of such imports" (Brief, at 12). As discussed *infra,* the Commission on remand found no substantial evidence of lost sales, but on the contrary, found that SCM's sales had increased during the period of the investigation.

also directed at the weight of the evidence. But fundamentally, the relative weight the Commission chose to accord market penetration *vis a vis* other equally pertinent injury criteria considered was a matter of discretion and expert judgment; and as we have seen, it is not the function of the Court in reviewing an injury determination of the Commission under the Antidumping Act to weigh the evidence or to substitute its judgment for that of the Commission. *Armstrong, supra.* Here, the Commission in making its injury determination acted well within its discretion in giving more weight to the various indices of the health of the domestic industry (supported by substantial evidence) than to the factor of significant market penetration, which market penetration the Commission noted had dropped precipitously in the last year for which information was collected.[6]

D. *Price Suppression*

The Commission's original statement found the evidence of record insufficient to establish price suppression. Plaintiff argued in its original motion for summary judgment that in determining the existence of price suppression, the Commission should have made a comparison between the wholesale price index for portable typewriters and that for office typewriters, rather than between the index for portable typewriters and that for office and store machines and equipment. In the remand order of July 1, 1981 the Commission was directed "to reconsider and advise this Court whether there was price suppression, after comparing the wholesale price indexes for portable typewriters and office (electric) typewriters; or to supply this Court with specific reasons why such basis for comparison is inappropriate".

The Commission, in its new statement, has "upon reevaluation of the record" again found no substantial evidence of price suppression as a result of the LTFV imports of portable electric typewriters. Indeed, on remand the Commission, after comparing the respective wholesale price indexes for portable typewriters and office electric typewriters (the comparison ordered by this Court), found:

> * * * prices for both types of typewriters increased at a similar pace throughout the 1971–1974 period. This information strongly tends to show no suppression of prices by reason of LTFV imports.

In the course of reconsidering its prior finding relative to the absence of price suppression, as required by this Court, the Commission carefully considered and discussed in its new statement the problem of using certain base years for making a realistic wholesale price-index comparison between office typewriters and portable typewriters. Given all the facts and circumstances taken into account by the Commission, I find the Commission's approach to be

[6]The Commission found that the percentage of the market achieved by the imports was about 21% in 1971, 29% in 1972, 37% in 1973 and dropped to 26% in 1974.

rational and supported by substantial evidence. Plaintiff's discussion in its brief of statistical methodology suggesting the rebasing of indexes and assertion of certain facts to challenge the Commission's findings are unsupported by the record.

E. *Lost Sales*

The majority's original Statement of Reasons made no explicit finding of lost sales.[7] However, the dissenting Commissioners apparently reasoned that lost sales were implicit or inferrable from SCM's loss of a significant share of the market.[8] However, no evidence of record respecting lost sales is referred to by the dissenters.

My order of remand directed the Commission to "make and report to this Court a specific finding of fact respecting whether there were lost sales as a consequence of market penetration by the Japanese LTFV imports". Responding, the Commission's new statement concluded that "[n]o information in the record of this case offers substantial evidence that the domestic industry lost a significant number of sales, or was injured thereby, as a result of imports of portable electric typewriters from Japan".

Plaintiff maintains that the Commission's new statement is not responsive to the Court's directive. This contention is plainly untenable. In point of fact, the Commission set forth in detail the basis for its conclusion and specifically addressed plaintiff's contentions.

Thus, the Commission rejected the argument that the increased market share obtained by the Japanese imports must necessarily have been achieved at the expense of the domestic industry in the form of lost sales. The information before the Commission showed that while the percentage of the market attained by the Japanese imports increased during the period of 1971–74, *the market share* in that period for *all imports* dropped, and consequently, *SCM's own sales increased substantially, both relatively to imports and in absolute terms.* Moreover, the Commission points up that the introduction of lower-priced models from Japan—

> * * * created a vastly increased market for portable typewriters by stimulating demand. As a result, only at most a small portion of the sales of Japanese imports represented a loss to SCM; instead, many represent sales that likely would never have been made in the absence of the low-end models from the market.

The Commission further considered plaintiff's contention that SCM lost specific sales to customers in the mass-merchandising area. On that score, the Commission found the information pre-

[7] As previously noted by this Court in 2 CIT —, Slip Op. 81-57: "Chairman Leonard considered 'that import penetration indicates injury only when it is established that the penetration is at the expense of the domestic industry *and causes lost sales*' (40 FR 27080, fn. 2) (Emphasis added). Implicitly, therefore, Chairman Leonard found there were no lost sales."

[8] The dissenting Commissioners found that SCM "has clearly lost a considerable share of the market and *consequently* lost considerable sales" (40 FR 27081) (emphasis added).

sented by SCM was "largely speculative and * * * rebutted in part by other information in the record." Specifically, the Commission rejected SCM's claimed losses to three accounts predicated, not on an actual decline in sales, "but on a projection of the amount of sales that SCM might have made in the absence of LTFV imports". In that connection, the Commission observed:

> SCM compares its actual average sales per store for three accounts in 1970 with its sales per store in 1974, measuring its claimed loss by the difference between the actual 1970 sales and the sales SCM would have made if it had maintained its 1970 ratio of sales per store.
>
> The assumption that each new store added by the three mass merchandisers handled as many portable typewriters as each store did in 1970 is disputed by other testimony in the record. It was pointed out that new stores opened by K-Mart in 1973 and 1974 were smaller than prior stores and devoted less display space to typewriters. In addition, one of the three mass merchandisers, in a confidential submission, informed the Commission that SCM's sales to it steadily increased between 1971 and 1973, and that it only began purchasing directly from the Japanese respondents in 1974. It also stated that if its purchases of LTFV imports had any effect on its business with SCM, it was because of (1) SCM's inability to provide it with the beginning price point models that were purchased prior to 1974 from Royal, and (2) SCM's failure to provide it with the full quantity of SCM's innovative cartridge ribbon typewriters that it could have sold. Finally, Table 16 is based on the underlying assumption that there was a one-to-one relationship between sales of Japanese imports and sales lost by SCM, an assumption that, as discussed above, is untendable. *Thus, there is no creditable evidence of record demonstrating significant lost sales by the domestic industry by reason of LTFV imports.* [Footnotes omitted.] [Emphasis added.]

I agree with the Commission's determination that there is no basis in the record for finding that SCM lost significant sales by reason of the LTFV imports. To overturn the Commission's conclusion on this aspect of the case would require the Court to engage in speculative second guessing, and judging the credibility and weight of certain evidentiary matters in the administrative record, which would usurp the Commission's discretion.

F. *Conclusion*

In summary, I find that on remand the Commission made a thorough examination of the record and rendered a good faith and legally adequate response to the Court's remand orders. Plaintiff's attack upon the good faith of the Commissioners is unsupported by the record.

This Court may disturb the Commission's determination only if it lacks any rational or statutory foundation or is unsupported by substantial evidence. From the Commission's new statement on remand, it is clear that in arriving at its negative determination the Commission considered appropriate economic and financial factors; and in a word, my examination of the administrative record reveals substantial evidence supporting the factual findings of the Commission.

Accordingly, for all the foregoing reasons the negative determination of the Commission is affirmed.[9] It is ordered that defendant's and party-in-interest's renewed cross-motions for summary judgment are granted; and plaintiff's renewed motion for summary judgment is denied.

(Slip Op. 82-55)

REPUBLIC STEEL CORPORATION, ET AL., PLAINTIFFS, *v.* THE UNITED STATES, ET AL., DEFENDANTS, AND AKTIENGESELLSCHAFT DER DILLINGER HUETTENWERKE, DEFENDANT-INTERVENOR

Court No. 82-6-00909

Before WATSON, *Judge.*

Memorandum and Order on Defendants' Motion To Dismiss, Plaintiffs' Motion To Expedite and Amicus Curiae's Motion To Consolidate

[Motion to Dismiss Denied. Motions to Expedite and Consolidate Granted.]

(Dated July 15, 1982)

J. Paul McGrath, Esq., Assistant Attorney General, for the defendant, by *Velta A. Melnbrencis, Esq.*, trial attorney, of counsel.

Cravath, Swaine, & Moore, Esqs., for the plaintiffs, by *Alan J. Hruska, Esq., Joseph R. Sahid, Esq.*, and *Steven G. Schulman, Esq.*, of counsel.

United States Steel Corporation, *amicus curiae*, by its Law Department; *D. B. King, J. J. Mangan* and *Leslie Ranney, Esqs.*, of counsel.

Windels, Marx, Davies & Ives, Esqs., for the intervenor Aktiengesellschaft der Dillinger Huettenwerke, by *Pierre F. deRavel d'Esclapon* and *Anthony A. Dean Esqs.*, of counsel.

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[9] As noted in my previous memorandum and order (Slip Op. 81-57), the Commission made an affirmative determination of injury on May 7, 1980 pursuant to plaintiff's petition filed on April 9, 1979 for the initiation of a second antidumping proceeding covering portable electric typewriters from Japan containing updated information. *Portable Electric Typewriters From Japan*, U.S.I.T.C. Public 1062, Investigation No. 731-TA-12, 45 FR 30186 (1980). On May 9, 1980 the Secretary of Commerce published an antidumping order. 45 FR 30618 (1980). When the Commission announced its affirmative determination, Commissioner Bedell, then the only member of the majority in the initial investigation remaining with the Commission, distinguished the negative determination in the initial investigation. Briefly, Chairman Bedell found that the economic conditions affecting the domestic industry under the initial investigation were quite different from those considered in the second investigation, and that the data showed that the earlier favorable trends had reversed. 45 FR 30188 (1980). Of course, in reviewing the Commission's negative determination in the first investigation, the Court could not—and thus did not—consider the new record before the Commission in the second investigation, which lead to an affirmative determination.

WATSON, *Judge:* This action was brough on June 27, 1982 to obtain judicial review of a finding, made in the course of a countervailing duty investigation, by the International Trade Administration of the Department of Commerce, (ITA) that certain coal subsidies were not a subsidy to the steel industry of the Federal Republic of Germany (FRG).

On June 30, 1982, plaintiffs moved, by means of an Order to Show Cause, to have the adjudication of the case expedited to the extent of having it ready for hearing and decision on July 15, 1982. On the July 6, 1982 return date of the Order to Show Cause the government moved to dismiss the action, leading the Court to hold the question of expedition in abeyance, and to utilize the July 15 date for the hearing and resolution of the Motion to Dismiss.

The Court having read and heard the arguments of the parties and *amicus* U.S. Steel Corporation, is of the opinion that the Motion to Dismiss ought to de denied.

The finding in dispute was one of many contained in a preliminary determination by the ITA under 19 U.S.C. § 1671b(b) and was published on June 17, 1982 (47 F.R. 26325). The object of the preliminary determination was to decide whether there was a reasonable basis to believe or suspect that certain steel products from the FRG were being subsidized, and, if so, to estimate the net subsidy, order the suspension of liquidation of entries of the products and require the posting of bonds sufficient to insure the payment of an additional duty equal to the estimated subsidy. In reaching its conclusions the ITA found that some practices were subsidies and others were not. It also found that the subsidies were received in a significant amount by some producers, but only in *de minimus* amounts by Thyssen AG and Estel Hoesch-Werke AG, and the latter two firms were "excluded."

The Court cannot accept the major premise of the motion to dismiss, namely, that the ITA determination is a monolithic decision which must be viewed as "affirmative" in its entirety under the statute. Nor can the Court accept the corollary, the proposition that plaintiffs are only challenging negative "aspects" of an affirmative determination. The Court finds this position to be inconsistent with the legislative expression and intention and patently unreasonable.

In 19 U.S.C. § 1516a(a)(1)(B) Congress granted judicial review of "a negative determination" made under 19 U.S.C. § 1671b(b). It is clear that Congress did not consider these determinations in simplistic terms, as unitary or indivisible pronouncements.

In 19 U.S.C. §1671b(c) it took pains to provide for the postponement of this determination in extraordinarily complicated cases and it referred specifically to those cases that involve numerous and complex alleged subsidies or those that create the need to determine which particular subsidies are used by individual producers. As plaintiffs point out, the same phrase, i.e., "a negative deter-

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mination," is used to describe that which is judicially reviewable in the *final* ITA decision on subsidies in 19 U.S.C. §1516a(2)(B)(ii). If it is not disputed that the decisions challenged here would be negative determinations in a *final* resolution, it would seem that they are no less negative in a preliminary decision. *Amicus* points to the use of the article "a" in referring to *a* negative determination rather than *the* negative determination. From the latter usage, one might have inferred a reference to a single, indivisible negative determination. From the former, and actual usage, the existence of numerous possible determinations is inferred.

All this textual and grammatical analysis serve to demonstrate that the characterization of this determination as an indivisible affirmative determination which cannot be judicially reviewed at this time is a highly questionable proposition. This would suffice to deny the motion to dismiss even if there were no legislative history. In this matter, however, the legislative history makes it unmistakeably clear that judicial review of these determinations was intended to reach every decision that a subsidy was not being provided—even if other subsidies were found to exist at the same time or if other producers were found to be subsidized.

Congress was well aware that it was establishing a highly pervasive scheme of judicial review in these matters, even to the point of providing judicial review while the investigations were continuing. It stated that it was providing for judicial review of "interim" decisions to avoid delay "which could make an ultimate resolution of an issue in a party's favor irrelevant because of the irreversible damage suffered during the interim period." S. Rep. No. 96–249, 96th Cong., 1st Sess., p. 245 (1979). It would be absurd to contend that the potential for damage which Congress foresaw, existed only when a determination was adverse in *every single respect.* It is far more reasonable to treat an investigation of this type, into the existence of more than one subsidy or involving more than one producer, as resulting in a series of discrete and severable determinations, each of which resolves a question of whether imported merchandise was receiving a subsidy. In these terms a preliminary determination that a particular practice is *not* a subsidy is a negative determination. A preliminary determination that a particular producer is *not* receiving a subsidy is a negative determination. Both results raise the possibility of interim damage because both allow the importation of merchandise during the interim period, free of the prospect of the assessment of countervailing duties with respect to alleged subsidies.

The specter of interference with the administrative process was obviously considered by Congress, the need for interlocutory judicial review was found to be more important, and the provision for expedited judicial review is the means of harmonizing these factors as much as possible.

For the above reasons, the defendants' motion to dismiss is Denied.

The motion by United States Steel Corporation to consolidate its action (Court No. 82-6-00899) with this action is hereby Granted.

The Court considers the date of August 24, 1982 (which is set for the final subsidy determination by the ITA) to mark the end of the interim period for which this judicial review was designed. Although a decision after that date could still be meaningful, it is best done earlier.

Accordingly, the Court finds that this action should be expedited for decision by August 5, 1982, to which end the defendants are Ordered to answer the complaint by July 21, and to respond to plaintiffs' motion for administrative review (which has already been filed) by August 2. Plaintiffs shall then reply by August 5. In this action, filing and service shall mean actual delivery to the parties and the Court.

(Slip Op. 82-56)

NADEL & SONS TOY CORP., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

No. 76-11-02616

Before RAO, *Judge.*

Plastic Push Button Old-Timer Savings Banks

[Judgment for plaintiff.]

(Dated July 15, 1982)

Mandel & Grunfeld (*Steven P. Florsheim* at the trial and on the briefs, *Robert B. Silverman* on the briefs) for plaintiff.

J. Paul McGrath, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office (*Robert H. White* at the trial, and on the briefs) for defendant.

RAO, *Judge:* This civil action involves the proper classification of merchandise described on the commercial invoices as "plastic push button patriotic savings banks," item No. 6165. It was manufactured by General Industrial Company in Kowloon, Hong Kong and imported into the United States by the plaintiff on August 19, 1975 at the port of New York. The merchandise can best be described as a nine-inch plastic replica of a cast iron bank in the figure of Uncle Sam standing on a decorated platform approximately two inches in height. The Uncle Sam figure is brightly painted with red and white striped pants, black shoes, blue jacket with tails, blue vest with gold-painted buttons and stars and a white stand-up collar. White cuffs appear at the ends of the jacket sleeves. The figure has white hair and a white beard and wears a gray high hat with a navy band trimmed with gold-painted stars. It holds a light blue

umbrella in the left hand while the right hand is extended at waist height. The coin to be deposited in the bank is placed in the extended hand. When the plunger to the left of the figure is depressed, the right hand drops the coin into a satchel to the right and slightly in front of the Uncle Sam figure, which opens to receive it. The coins are stored in the base of the bank and can be removed by extracting a disc under the bank which reveals an opening of approximately 1¼ inches in diameter.

The United States Customs Service (hereinafter Customs) classified the merchandise under item 737.90, Tariff Schedules of the United States as modified by Presidential Proclamation 3822, T.D. 68-9 (hereinafter TSUS), as "Toys, and parts of toys, not specially provided for: Other," with duty at the rate of 17.5 percent ad valorem.

Plaintiff claims that the merchandise is properly classifiable under item 774.60, TSUS, as "Articles not specially provided for, of rubber or plastic: Other," with a duty rate of 8.5 percent ad valorem; or alternatively, under item 772.15, TSUS, as "* * * household articles, not specially provided for: Other," with a duty also at the rate of 8.5 percent ad valorem.[1]

It is defendant's position that the plastic banks are "toys" for classification purposes. The word "toy" is defined in Schedule 7, Subpart E, headnote 2:

> 2. For the purposes of the tariff schedules a "*toy*" is any article chiefly used for the amusement of children or adults.

Defendant claims that the amusement feature of the bank is greater than any other feature of the merchandise, including the saving factor.

Plaintiff claims that the bank is chiefly used for saving and that its amusement feature is ancillary or incidental to this use. At the trial, plaintiff adduced evidence to the effect that the merchandise is designed for persons over the age of five years and that it was marketed throughout the country as a premium and gift shop item, although it was also sold to toy retailers. Plaintiff's president, Melvin Nadel, hoped that the patriotic theme of the "Uncle Sam" figure would appeal to end users during the Bicentennial Celebration, and this expectation was realized when the item became popular and sold well. (R. 23). The merchandise is offered for sale through plaintiff's catalogue (plaintiff's exhibit 2) under the category "banks" and is not included with the toys, which are listed separately.

Defendant's one witness, John Peter Hayden, Jr., is the manager of marketing services at the Museum of the City of New York. In this position he oversees the museum shop, where reproductions of antique dolls and toy banks are sold (R. 61). Prior to this employ-

[1] Plaintiff had also claimed alterntatively that the merchandise was classifiable under item 737.65, TSUS, as "magic tricks, and practical joke articles" with a duty rate of 10 percent ad valorem, but it abandoned this claim at the trial.

ment he was the director of the Ancram Restoration, a Victorian village that was restored to its condition in the last quarter of the 19th century, where replicas of merchandise available during that era were sold. It was Mr. Hayden's opinion that the merchandise, as a bank, is a toy, and that it is suitable for sale to children. He differentiated between "still banks" which have no moving parts and those that have a mechanical feature, and said that all banks are toys in the historical field (R. 68–69). His expertise, credentials or background as an expert witness for this type of merchandise were not, however, established, nor were the many authorities to which he alluded (R. 69) ever identified.

The issue in this action is whether the merchandise is chiefly used for the amusement of children or adults and the burden is on the plaintiff to prove that it is not, since the classification by Customs is presumptively correct. 28 U.S.C. 2635; *Joseph E. Seagram & Sons, Inc.* v. *United States,* 30 CCPA 150, 157, C.A.D. 227 (1943).

Plaintiff relies on this court's decision in *House of Ideas, Inc.* v. *United States,* 2 CIT —, Slip Op. 81–74 (August 11, 1981), as a precedent, and we are inclined to agree that, although the merchandise there, papiermache banks shaped like clowns, is not the same or similar to the instant merchandise, the principles enunciated therein are controlling here.

The issue in *House of Ideas, Inc., supra,* was whether a bank in human shape is a doll or a bank, with the government arguing that the item did not possess "two equally essential functions" as required in *Janex Corp.* v. *United States,* 80 Cust. Ct. 146, C.D. 4748 (1978). The court stated:

> The design and construction of plantiiff's exhibit #1 belie that contention. It is patently clear that the object has two design characteristics. One, the doll component, has the superficial appearance of a human figure. The other, the bank component, has the function of a receptacle and storage space for coins or folded bills. Inasmuch as the commercial viability of the item depends on its functioning as a bank, this aspect of the article is not insignificant or incidental to the use of the article as a replica of a human figure.

The commercial value of the merchandise involved here also depends on its functioning as a bank or receptacle for and storage space for coins or folded bills. Plaintiff's witness, Mrs. Jamoom, testified that she purchased a similar bank for her children, who never used it without inserting a coin (R. 51), that the bank was kept on a shelf and was only brought out when some person or guest had given the children money to insert into it. The children did not otherwise play with it.

It should also be noted that the portion of the item utilized for the storage of coins is substantial and would hold a large number of coins, becoming heavier and heavier with each use. It is doubtful

that a child or adult would play with an item that could contain a significant number of coins, particularly since it could be mislaid.

While the manner in which an article is marketed is not determinative of its classification, it is a factor to be considered. *Russ Berrie & Co.* v. *United States,* 76 Cust. Ct. 218, 226, C.D. 4659, 417 F. Supp. 1035, appeal dismissed, 63 CCPA 125 (1976); *United States* v. *Ignaz Strauss & Co., Inc.,* 37 CCPA 32, C.A.D. 415 (1949); *Rene D. Lyon Co., Inc.* v. *United States,* 80 Cust. Ct. 39, C.D. 4735 (1978). Plaintiff marketed and sold the merchandise as a bank rather than as a toy. The testimony of Mr. Nadel established that the bank was sold to gift stores, to parks, to premium establishments and to banks which bought them as giveaways (R. 22). The Uncle Sam figure as an added figure to sell the bank (R. 23).

Witnesses who are in the business of buying and selling merchandise are qualified to give their opinion as to its use. They have every incentive for knowing the uses to which their wares are or may be put; therefore it is fair to assume, at least *prima facie,* that the uses known to them are the uses of the articles. *Klipstein* v. *United States,* 1 Ct. Cust. Appls. 122, 124, T.D. 31120 (1910), Sturm, *Customs Law and Administration,* § 57.11, p. 667. Also, responsible executives, concerned with designing, specifying, importing, promoting and selling merchandise may testify what its uses are, on the hypothesis that such persons must of necessity know those uses. Such evidence is of greater evidentiary value than sporadic instances of actual uses. *F. B. Vandegrift & Co., Inc.* v. *United States,* 56 Cust. Ct. 103, C.D. 2617 (1966). Mr. Nadel is plaintiff's president and does all the buying, some of the selling and the administrative work. He has been in this business for over forty years (R. 8).

In *United States* v. *Topps Chewing Gum,* 58 CCPA 157, C.A.D. 1022 (1971), our appeals court clarified one of the tests to be utilized in determining whether an article constitutes a toy. In deciding whether buttons with humorous sayings on them were toys or buttons of metal, the Court stated:

> After noting that prior to the enactment of the TSUS a "toy" was defined as a child's plaything, the [trial] court cited *Wilson's Customs Clearance, Inc.* v. *United States,* 59 Cust. Ct. 36, C.D. 3061 (1967), for the proposition that the TSUS removed the limitation regarding the users' age but left the requirement that the object be a plaything. We think this conclusion is unsupported by the wording of the TSUS or by case authority. In the *Wilson's* case the court did not hold that to be a toy an object had to *be* a plaything, but that the "character of amusement involved was that derived from an item which is essentially a plaything." *Id.* at 39. The court thus stressed the quality of mind or emotion induced by the object as controlling and we think that is the best approach to interpreting the TSUS definition. If the purpose of an object is to give the same kind of enjoyment as playthings give, its purpose is amuse-

ment, whether the object is to be manually manipulated, used in a game, or, as here, worn.

The purpose of the article involved in this action is the saving and storing of coins. That the coins are received into the article in a manner that amuses is incidental and not controlling. While one may sit and idly push the plunger which causes the arm to go down and the satchel to open (R. 25), there is little "amusement value" in such activity, and this pastime would soon be abandoned.

This court now considers the representative sample of the merchandise introduced into evidence as plaintiff's exhibit 1. Representative samples of the merchandise are often potent witnesses. Sturm, *supra*, Section 57.10 Samples, p. 665 and cases cited therein. Indeed, in toy cases, it is not uncommon for the samples themselves to be of sufficient probative value to prove the original classification erroneous and the asserted classification correct. *Amico, Inc. (Formerly known as: Exhibit Sales, Inc.)* v. *United States*, 73 Cust. Ct. 150, C.D. 4566 (1974). This sample, with its obvious and pronounced similarity to the Uncle Sam figure, and its dominant banking theme identifies in the strongest way as being an attractive article for the storage of money and its mechanical feature of having the coin deposited into the satchel when the lever is pushed is designed to make saving coins attractive. That it may also incidentally amuse children or adults does not make it a toy.

We consider lastly defendant's argument that the legislative history of the TSUS as gleaned from the *Explanatory Notes to the Brussels Nomenclature* and the *Tariff Classification Study* support classification of the merchandise as a toy. Defendant cites Heading 97.03 of the *Brussels Nomenclature*, which provides:

> 97.03—Other Toys, Working Models of a Kind Used for Recreational Purposes
>
> This heading covers all toys not included in heading 97.01 or 97.02. Many of the toys in the present heading are mechanically or electrically operated (e.g. by spring-operated [clock work] or electric motors, etc.).
>
> This heading includes:
>
> * * * * * * *
>
> (22) Toy money boxes; * * *

Defendant claims that the wording of this provision is sufficiently similar to item 737.90, TSUS, to provide the necessary nexus so that Brussels can be considered a proper guide to congressional intent. *Herbert G. Schwarz, dba Ski Imports* v. *United States*, 57 CCPA 19, C.A.D. 971, 417 F. 2d 1391 (1969).

The provision to which the *Brussels* heading must be compared for similarity is:

> Toys and parts of toys, not specially provided for:
>
> * * * * * * *

739.90 Other..... 17.5% ad valorem

Where the order, language or phraseology of the Tariff Schedules and the Brussels Nomenclature differ, the latter cannot be used as a guide to the intention of the Tariff Commission or of Congress. *Hollywood Accessories Division of Allen Electronics & Equipment Co.* v. *United States,* 60 Cust. Ct. 360, C.D. 3391, 282 F. Supp. 499 (1968); *M. Hohner Inc.* v. *United States,* 63 Cust. Ct. 496, 500–501, C.D. 3942 (1969); *Cengar U.S. Inc.* v. *United States,* 65 Cust. Ct. 677, C.D. 4157, 319 F. Supp. 1404 (1970).

It is clear that the language, order and arrangement of the provision of the TSUS to be compared with Heading 97.03, Brussels Nomenclature, are dissimilar and that Brussels should not be considered in determing whether the merchandise herein is toys for tariff schedule purposes.

Defendant's brief also quotes at length from two provisions of the *Tariff Classification Study,* Schedule 7 (1960) at pages 290 and 295. Without setting these statements out *in toto,* we observe that the result of the first discussion was to change the basic concept of what constitutes a toy to include articles for the amusement of adults as well as those for the amusement of persons under the age of puberty. The second statement explains how paragraph 1513 of the old schedule had been subdivided into items 737.80 and 737.90 and the changes in duties involved in the consolidation of all toys under these provisions. Neither explanatory discussion alludes to banks, money boxes or any articles which would indicate an intention that the merchandise in question is a toy for tariff schedule purposes.

We conclude that the merchandise is not a toy and consider whether the classification claimed by plaintiff is the correct one, i.e., that the merchandise is "articles, not specially provided for, of rubber or plastics, other." Paragraph 12 of plaintiff's complaint alleges that "the subject merchandise is 'of plastics' " and defendant's answer admitted the truth of this allegation. Since there is no special provision that specially provides for savings banks, banks or money boxes in the TSUS, plaintiff has established that the claimed classification is the proper one.

The protest is sustained and judgment will be entered accordingly.

(Slip Op. 82–57)

LOCKHEED PETROLEUM SERVICES, LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consol. No. 77–9–03991

Before RAO, *Judge.*

Drawback of Duties on Manifold Centre

[Judgment for plaintiff.]

(Dated July 21, 1982)

Shaw and Stedina (*Charles P. Deem* at the trial and on the briefs) for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Jerry P. Wiskin* at the trial and on the briefs); for the defendant.

RAO, *Judge:* This case involves a manifold centre, manufactured by the plaintiff in Canada and imported into the United States on October 11, 1974 for incorporation into the vessel M/C BASE by Delta Shipyards in Homer, Louisiana in 1975. The M/C BASE was built by the plaintiff, a Canadian corporation, to be used for oil exploration in a permanent installation on the continental shelf in the Gulf of Mexico.

Prior to the importation of the manifold centre, the plaintiff applied for and obtained from the U.S. Customs Service (hereinafter Customs) a ruling that the manifold centre would be eligible for drawback under section 313(g) of the Tariff Act of 1930, as amended [19 U.S.C. 1313(g)]. Subsequently, plaintiff obtained a drawback rate, authorizing the drawback of duties on the exportation of the M/C BASE, subject to plaintiff's compliance with the pertinent Customs regulations (19 C.F.R. 22.1 et seq.).

The M/C Base was completed in August of 1975 and left the port of New Orleans on August 18, 1975 for Block 331 of the Eugene Island area of the outer continental shelf, some 80 miles out from New Orleans in the Gulf of Mexico. On the following day, August 19, 1975, plaintiff filed an abstract of manufacture with the District Director of Customs at New Orleans, required by section 22.4(g), Customs Regulations, 19 C.F.R. 22.4(g), which states:

> (g) The builder of a vessel or aircraft upon which drawback is to be claimed under section 313(g), Tariff Act of 1930, shall keep the records provided for in this section so far as applicable. An abstract of such records shall be filed with the collector of customs, at the headquarters port of the collection district in which the vessel or aircraft is built in ample time prior to the first departure of the vessel or aircraft from the United States to enable that officer to have the abstract verified by examination of the vessel or aircraft and the builder's records pertaining thereto.

Plaintiff filed a drawback entry on December 10, 1975, to which a certificate of manufacture and delivery was attached, which contained a declaration signed by the proprietor and the foreman of Delta Shipyards that the duty-paid manifold centre was used in the manufacture of the vessel "MC BASE" which was delivered to Lockheed Petroleum Services, Ltd. on August 18, 1975. Drawback was denied by Customs on February 24, 1977 because section 22.4(g)

of the Customs Regulations had not been complied with in that there was no examination of the vessel prior to its departure and that the vessel did not clear for a foreign port pursuant to 19 C.F.R. § 22.13(f). Plaintiff sought reconsideration of this denial by letters to Customs of March 5 and June 8, 1976. On March 28, 1977 plaintiff filed protest No. 2002 700082 for review of the refusal to pay drawback. The drawback entry was liquidated on April 8, 1977 and the protest was denied as untimely, having been filed before the entry was liquidated.

Subsequently, additional protests were filed to obtain review of the decision to deny drawback, all of which were denied by Customs, and plaintiff commenced the instant action on September 29, 1977. On January 3, 1978 plaintiff moved to consolidate this action with two other cases and the defendant opposed and requested a stay. Chief Judge Re granted an extension of time for defendant to respond to the motion for consolidation.

Thereafter, on July 10, 1978 the motion to consolidate the three actions was granted by Judge Boe and on January 11, 1979 Judge Ford granted a motion to extend the time for the defendant to answer the complaint. On April 22, 1980 a motion to extend the time for preparation for trial was granted by Judge Watson, and on March 26, 1981 the case was assigned to Judge Rao.[1]

Plaintiff relies on section 313(a) of the Tariff Act of 1930, as amended [19 U.S.C. 1313(a)], which states:

> Upon the exportation of articles manufactured or produced in the United States with the use of imported merchandise, the full amount of the duties paid upon the merchandise so used shall be refunded as drawback, less 1 per centum of such duties * * *.

and on section 313(g) of the same act:

> The provisions of this section shall apply to materials imported and used in the construction and equipment of vessels built for foreign account and ownership, or for the government of any foreign country, notwithstanding that such vessels may not within the strict meaning of the term be articles exported.

Plaintiff takes the position that it has complied with all the pertinent Customs regulations, that the abstract of manufacture arrived at Customs in New Orleans after the M/C BASE had departed from the port of New Orleans through no fault of plaintiff and that it is ready, willing and able to take the Customs officials to inspect the vessel at its present location, if Customs still feels inspection is necessary to certify that the imported manifold centre

[1] Judge Rao is the fifth judge who has participated in this action. On November 17, 1978 Judge Rao called to the attention of the Court that the rule as to the assignment of cases at the discretion of the Chief Judge should be changed and that this court should follow the procedure utilized by the U.S. District Courts, that cases are assigned when filed on a random basis. No action was taken by the Rules Committee at that time, nor when the matter was again raised on March 12, 1981, by letter to all judges.

was indeed incorporated into the exported vessel, using its own facilities to transport Customs officials to the site.

It is defendant's position that drawback was denied due to the failure of the plaintiff to insure that the abstract of manufacture reached Customs before the vessel first left the United States, that it did not clear for a foreign port and that Customs never waived inspection of the vessel to determine that the imported merchandise was used in the manufacture of the M/C BASE.

Defendant also claims that the Customs regulations are mandatory and that compliance with the regulations is a condition precedent to the allowance of drawback of duties; and that drawback is a privilege and not a right, subject to section 313(j) of the Tariff Act of 1930, as amended, which provides:

> (j) Allowance of the privileges provided for in this section shall be subject to compliance with such rules and regulations as the Secretary of the Treasury shall prescribe, which may include, but need not be limited to, the fixing of a time limit within which drawback entries or entries for refund under any of the provisions of this section or section 1309(b) of this title shall be filed and completed, and the designation of the person to whom any refund or repayment of drawback shall be made.

The purpose underlying the granting of drawback of duties is to encourage the production of articles for export in the United States, thus increasing domestic manufactures, increasing foreign commerce and aiding American industry and labor. *United States* v. *International Paint Co., Inc.*, 35 CCPA 87, 90 (1948); *United States* v. *The National Sugar Refining Co.*, 39 CCPA 96, 99, C.A.D. 470 (1951). Thus, the salubrious effect of the grant was to benefit many segments of American commerce and was intended by Congress and recognized early by the courts. Provisions relating to drawback were made by the Tariff Acts of October 1, 1890, c. 1244, § 25, 26 Stat. 617, and the Tariff Act of August 27, 1894, c. 349, § 22, 28 Stat. 551, for example.

In *Campbell* v. *United States*, 107 U.S. 407 (1882), one of the earliest cases in which the Supreme Court decided a Customs case involving drawback of duties, the Court upheld the claim. It concerned linseed oil from Calcutta which was manufactured into linseed cakes in this country and then exported to London. Despite the fact that the Customs regulations then in effect dealing with drawback of duties had been complied with by the plaintiff, the collector did not issue the drawback certificate which would entitle the plaintiff to payment of drawback, presumably by order of the then Secretary of the Treasury. In deciding that Treasury could not defeat the plaintiff's drawback claim, the Court, speaking through Mr. Justice Miller, found an implied contract between the government and the importer for the payment of the drawback, based, not on the Customs regulations, but on the act of Congress establishing the drawback of duties (12 Stat. at L. 292):

> [T]he facts found in this case raise an implied contract that the United States will refund to the importer the amount he paid to the Government.
>
> * * * * * * *
>
> The act of Congress having declared that on exportation there shall be allowed a drawback equal in amount to the duty paid on such material, and the Secretary having established by a regulation that, as regarded the cake resulting from the manufacture of the linseed into oil and cake, the latter represents at seventeen cents per hundred pounds the duty on the imported seed so converted into cake, there resulted a contract that when exported the Government would refund, repay, pay back, this amount as a drawback to the importer. If this be not so, it is because it is impossible to make a contract when the details of its *execution* or *performance* are left to officers who refuse to carry them out.
>
> So it is * * * clear that this claim is founded on the law allowing drawback.

Over the years, the courts have held that the allowance of drawback is a privilege and compliance with the regulations is a prerequisite to securing it where the regulations are authorized and reasonable. *United States* v. *Ricard-Brewster Oil Co.*, 29 CCPA 192, C.A.D. 191 (1942); *Garret-Hewitt International et al.* v. *United States*, 65 Cust. Ct. 656, C.D. 4154 (1970).

Plaintiff entered into its contract to construct the M/C BASE in this country because it believed that it would be entitled to drawback on the manifold centre imported from Canada. In communications with Customs, it established a drawback rate and proceeded to comply with the applicable Customs regulations. It was prevented from complete compliance with Customs Regulation 22.4(g) only by reason of the unforeseen, injurious and unfortunate occurrence that the United States Postal Service did not deliver the abstract of manufacture until after the departure of the M/C BASE from the United States, albeit only by hours.

Plaintiff stands ready, willing and able to offer its facilities to Customs for an inspection of the vessel to ascertain that the imported manifold centre was indeed incorporated into the M/C BASE.

Section 1585 of the Customs Courts Act of 1980 reads as follows:

> The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States.

By virtue of section 701(a) of that act, as amended by Public Law 96-542, December 17, 1980, this grant applies with respect to civil actions pending on the effective date of the act, November 1, 1980. Thus, the court has the power to grant equitable relief in this civil action.

The applicable Customs Regulation, 19 C.F.R. 22.4(g), requires that the abstract of manufacture should have been filed with Customs prior to the first departure of the vessel from the United States. In this case the vessel departed from the port of New Orleans for the Gulf of Mexico the date prior to the receipt of the abstract of manufacture, which had been mailed from New York by the attorney for plaintiff.

The affidavit of Mr. Charles P. Deem, attorney for plaintiff, sworn to on October 22, 1980 (Exhibit 5) states in part:

> In early January, 1976, I conferred in New Orleans with three Customs drawback officials regarding drawback entry 214736, and was advised in effect that although the shipbuilders abstract required by Section 22.4(g), Customs Regulations, was not received by Customs until a short time after the M/C BASE was towed out of the Port of New Orleans, Customs was not thereby prejudiced since, in light of the available records, the nature of the vessel and the drawback material involved, examination of the M/C BASE was not necessary for verification of the abstract.
>
> That at the same time, I advised those officials of the availability of the M/C BASE for examination, at plaintiff's expense, and Customs' convenience, at its location in the Gulf, utilizing plaintiff's Service System, including its tethered submersible diving bell type personnel capsule.

One of the first maxims in equity is that "equity looks to the intent rather than to the form" and "it is only by looking at the intent rather than at the form that equity is able to treat as done that which in good conscience ought to be done." Equity always attempts to weigh the substance of things, and to ascertain, uphold and enforce rights and duties which spring from the real relations of parties. It will not suffer the mere appearance and external form to conceal the true purposes, objects, and consequences of a transaction. Pomeroy, *Equity Jurisprudence,* § 378, Vol. 2, pp. 40,41.

The intent and substance of the drawback statute is that the importer of articles of commerce who can establish that the articles were subsequently exported from this country is entitled to receive a drawback (or refund) of the duties paid in importation, provided the applicable Customs regulations have been complied with. In *Bartlett* v. *Kane,* 57 U.S. 263 (1853), Mr. Justice Campbell stated:

> The provisions for the return of the duty upon an exportation from a part of the system of regulations for importations and revenue from the earliest period of our government, and has always been understood to establish relations between the regular and honest importer and the government.

The legislative history of section 313(g), originally enacted by Congress as part of the Tariff Act of 1909, indicates that the provision was intended to encourage American industry and assist American labor. The hearings before the Committee on Ways and

Means of the House of Representatives, 60th Congress, on December 4, 1908, produced this comment from Representative Lovering of Massachusetts:

> First. Provision for the allowance of drawback on article of domestic manufacture, made in whole or in part from imported duty-free materials used in the construction and equipment of vessels built for foreign account and ownership and for the foreign trade. It has been ruled by the Treasury Department that the present law can not be so construed as to authorize the payment of drawback under such conditions. In the testimony of Edwin A. Cramp, he included the following decision of the Treasury Department to show the urgent necessity for the amendment desired by the shipbuilding industry:
>
> TREASURY DEPARTMENT, *July 7, 1899.*
>
> Gentlemen: Replying to your inquiry of the 3rd instant, whether drawback under section 30 of the act of July 24, 1897, will be allowed on boiler tubes manufactured by the Shelby Steel Tube Company, of Cleveland, Ohio, from imported Swedish billets and intended to be used in the construction of boilers for two Russian battle ships, now being built by Messrs. Cramp & Sons Company, of Philadelphia, I have to inform you that no drawbacks of duties under section 30 of the act of July 24, 1897, can be allowed on the boiler tubes in question as the use thereof in the construction of the boilers for the battle ships referred to can not be considered an exportation within the meaning of section 30.
>
> Mr. Cramp then called attention to section 12 of the Dingley Act, which provides for the importation, free of duty, of all materials and articles necessary in the construction of vessels built in the United States for foreign account and ownership and for the foreign trade, on which he comments as follows:
>
> Under this law foreign manufacturers who either pay no duty on their materials, or who receive a drawback on the exportation of their goods to the United States, can sell to American shipbuilders absolutely free of duty, while domestic manufacturers employing American labor, who are compelled to import materials from abroad, are denied a refund of the duties thereon when their goods are sold and used for a similar purpose.
>
> This is a serious discrimination against American labor, American manufacturers, and American shipbuilders, and should receive immediate consideration by Congress.

This evidences an intention on the part of Congress to assist American industry through allowing the benefits of drawback to be liberally applied.

Equity will also act to give relief in case of accident. This term was defined by Elias Merwin in his treatise, *Equity and Equity Pleading,* at p. 212 as "an unforeseen and injurious occurrence, not

attributable to mistake, negligence or misconduct, against the consequences of which a court of law affords no adequate redress." Mr. Justice Story has defined accident (1 *Story's Eq.* § 78) as "such unforeseen events, misfortunes, losses, acts or omissions as are not the result of any negligence or misconduct in the party."

In this case the regulations cannot be complied with, there being no further opportunity for the vessel, M/C BASE, to again leave the United States for the first time. The unforeseen occurrence was the delay in mail delivery which resulted in the abstract arriving within hours of the departure of the M/C BASE. It has been stated in equity that where a duty is created by law, the party will be excused from performing it if disabled without his own fault:

> When the law creates a duty, and the party is disabled from performing it without any fault of his own, the law will excuse him. *Mill Dam Foundry* v. *Hovey,* 21 Pick. 417, 441.

The failure of the plaintiff to comply with Customs Regulation 22.4(g) was occasioned by slow mail delivery, late less than 24 hours.[2] The abstract of manufacture arrived at Customs less than 24 hours after the M/C BASE left the port of New Orleans. This constitutes an unforeseen event, misfortune or omission not the result of any misconduct on the part of the party and is within the purview of the term "accident" as contemplated by Mr. Justice Story, *supra.*

There is also an element of forfeiture under the facts in this case in that the drawback claim of the plaintiff was established with Customs long before the merchandise was incorporated into the M/C BASE. There was long communication between plaintiff and Customs in establishing the right to drawback and plaintiff relied on the representations of Customs that drawback would be allowed, only to be told later that the drawback would be disallowed (or forfeited) because the abstract arrived 24 hours late.

This court, acting within its equity jurisdiction, finds that the abstract of manufacture was prevented from being timely delivered to the Customs Service at New Orleans by reason of an accident not attributable to misconduct on the part of plaintiff and that relief should be granted.

The certificate of manufacture and delivery (Customs form 7757–A) attached to the drawback entry received into evidence without objection at the trial of this action contains the statements of Ralph A. Arcenal, proprietor of Delta Shipyard, and of Kerry Chauvin, project manager and foreman of Delta Shipyard, to the effect that an imported manifold centre was imported by Lockheed Petroleum Services on October 11, 1974 and was incorporated into the vessel identified as the "MC BASE." Defendant made no objec-

[2] See the affidavit of Kerry Chauvin attached to plaintiff's memorandum in opposition to defendant's cross-motion for summary judgment in which he states that the abstract of manufacture was sent to plaintiff's attorney on August 13, 1975 in the belief that it would be received by him and filed with the District Director of Customs at New Orleans in sufficient time to allow for inspection of the vessel by Customs.

tion to this document and it has been received as part of the record of this case. The court finds it to be sufficient proof that the imported merchandise was used in the manufacture of the M/C BASE.

The defendant has admitted that the M/C BASE has been exported and this court so holds [see page 16 of defendant's post trial brief]. However, defendant also relies on the fact that the vessel did not clear for a foreign port as required by Customs Reg. 22.13(f). Again, the statute, 19 U.S.C. 1313(g), which applies to materials for the construction of equipment for vessels, provides:

> The provisions of this section shall apply to materials imported and used in the construction and equipment of vessels built for foreign account and ownership, or for the government of any foreign country, notwithstanding that such vessels may not within the strict meaning of the term be articles exported.

The requirements of the statute are satisfied if the imported materials are used in the construction and equipment of vessels built for foreign account and ownership. Plaintiff is a Canadian corporation and the M/C BASE was built for its account and ownership, so the statutory requirements are satisfied. As to the Customs regulation that requires a vessel to clear for a foreign port, it is more applicable to actual vessels which are to be used in navigation than to a manifold centre base which is to be used in oil exploration in a permanent installation on the continental shelf. While it is possible that the M/C BASE could have been cleared for a foreign port for the sole purpose of satisfying the regulation, the law will not require a useless act, and this court is satisfied that plaintiff has satisfied the requirements for drawback on the manifold centre now part of the M/C BASE.

We come lastly to defendant's claim that Court No. 77-9-03991 should be severed from the instant consolidated action and dismissed because the protest was filed before the entry was liquidated, pursuant to section 514(b)(2) of the Tariff Act of 1930, as amended, 19 U.S.C. 1514(b)(2), which states:

> A protest of a decision, order, or finding described in subsection (a) shall be filed with such customs officer within 90 days after but not before—
>
> (A) Notice of liquidation or reliquidation, or
>
> (B) In circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.

Court No. 77-9-03991 was consolidated with two other civil actions dealing with the same facts and issues, by order of this court. Court No. 77-12-04815 covering Protest No. 2002 27000112 filed April 25, 1977 would not be subject to dismissal, as the protest was filed after the entry was liquidated on April 8, 1977. This court accordingly severs and dismisses Court No. 77-9-03991 and decides the

issues involved herein in favor of plaintiff under Court No. 77-12-04815, under equitable principles.

In the interest of justice, it is the decision of this court that the plaintiff is entitled to drawback of duties for the manifold centre imported into the United States by plaintiff, which was incorporated into the vessel M/C BASE. Judgment is entered for plaintiff.

(Slip Op. 82-58)

REPUBLIC STEEL CORPORATION, ET AL., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 82-2-00207

Before WATSON, *Judge.*

Opinion and Order on Cross Motions for Judgment on the Administrative Record

[Plaintiffs' Motion Granted. Remanded with Instructions.]

(Dated July 22, 1982)

Cravath, Swaine & Moore (*Alan J. Hruska, Esq.* of counsel) for plaintiffs.

J. Paul McGrath, Assistant Attorney General (*David M. Cohen,* Branch Director, Commercial Litigation Branch, *Velta A. Melnbrencis,* Commercial Litigation Branch) and *Robert Seely,* Staff Attorney, Office of the General Counsel, Import Administration, U.S. Department of Commerce, for defendants.

United States Steel Corporation, *amicus curiae* by its Law Department (*D. B. King, J. J. Mangan* and *Leslie Ranney,* Esqs. of counsel).

WATSON, *Judge:* Plaintiffs brought this action to obtain judicial review of decisions by the Department of Commerce not to start a number of countervailing duty investigations and its decision not to start an antidumping duty investigation. The action originates in section 516A of the Tariff Act of 1930 (the Act) (19 U.S.C. § 1516a(a)(1)(A)(i)) and the Court has jurisdiction under 28 U.S.C. § 1581(c).

The matter is now before the Court on cross-motions for judgment on the Administrative Record under Rule 56.1 of the Rules of the Court. A brief was also received on behalf of *amicus curiae,* the United States Steel Corporation. Oral argument was held on July 15, 1982.

On January 11, 1982, plaintiffs filed a petition with the International Trade Administration of the Department of Commerce (ITA) and the United States International Trade Commission (ITC) seeking the assessment of countervailing duties and antidumping duties on the ground that the steel industry in the United States was being materially injured by, or threatened with injury from, the importation of nine types of steel products.[1] It was alleged that the

[1] Carbon plate, hot rolled carbon sheet, cold rolled carbon sheet, galvanized sheet, structurals, hot rolled carbon bars, hot rolled alloy bars, cold finished carbon bars and cold finished alloy bars.

products were being subsidized by ten foreign nations [2] as well as by the European Economic Community (EC). With respect to the petition for antidumping duties, it was alleged that the products from Romania were sold or were likely to be sold at less than fair value.

Under sections 702(c) and 732(c) of the Act (19 U.S.C. §§ 1671a(c) and 1673a(c)), which are parallel provisions governing the administrative treatment of the petition in countervailing duties and antidumping duties, the ITA had 20 days to determine the sufficiency of the petition and, depending on that determination, either start an investigation or dimiss the petition, with the publication of notice in the Federal Register in either instance.

On February 2, 1982, the ITA dismissed the petition insofar as it asked for the assessment of countervailing duties on four types of steel bars from the Netherlands and one type from Luxembourg on the ground that in recent years there had been no or only *de minimis* importations of those products. 47 F.R. 5743 and 5750. The ITA also dismissed the petition insofar as it asked for the assessment of antidumping duties on hot rolled and cold rolled carbon steel sheet from Romania on the same ground, as well as on the ground that there was no evidence of *bona fide* offers at less than fair value.

To the same effect, but without a published notice, the ITA did not initiate a separate investigation of the allegations relating to the EC.[3] In other words, it did not treat the EC as a distinct country. Instead, when it determined to start investigations it limited each investigation to products from a single nation. When the nation was a member of the EC, the ITA announced in the notice of initiation of that investigation that it was proceeding to investigate both the national and the EC subsidies with respect to the products of that nation. 47 F.R. 5739–52.

The defendants make the assertion that by ascertaining the EC subsidies in each national investigation the ITA made an investigation of the EC. This assertion comes from a limited focus on section 702(c) of the Act (19 U.S.C. § 1671a(c)) and an inflation of its importance. That section states that if the ITA finds the petition sufficient it shall "commence an investigation to determine whether a subsidy is being provided." But the statutory provision which is central to the commencement of an investigation in the full sense is section 702(b) of the Act (19 U.S.C. § 1671a(b)) which states that "a countervailing duty proceeding shall be commenced" whenever an interested party files a sufficient petition with the ITA. The term "proceeding" is defined in the legislative history as "that ac-

[2] United Kingdom, France, Belgium, Federal Republic of Germany, Luxembourg, the Netherlands, Italy, Brazil, Spain and South Africa.

[3] Defendants raise jurisdictional objections, which border on the frivolous, that the complete failure of the ITA to initiate investigations against the EC as an entity is somehow not reviewable, either because it was not a "determination" in the formal sense, or because it was merely a choice of a method of investigation which can only be challenged in a judicial review of the ultimate decision to which the method contributes. The short answer to these arguments is that what was done by the ITA represents a more serious failure to initiate than was specified in the statute and is reviewable *a fortiori*.

tivity which begins when a petition is filed under section 702(b) and ends upon the final disposition of the case, up to a revocation of a countervailing duty order, if any, under section 702, 703, 704, 705, or 751, as the case may be." S. Rep. No. 96-249, 96th Cong., 1st Sess. 46 (1979).

In effect then, it is the *petition* which begins the over-all proceeding and it is the *petition* which should control the objectives of the entire investigation unless it is found to be defective and dismissed within 20 days. The "proceeding" started by petition is the same thing as the "investigation" which is self-initiated by the ITA under section 702(a) (19 U.S.C. § 1671a(a)). In both cases the investigation must have a coherent purpose, which means that there must be a correspondence as soon as possible between the determination of the element of subsidy and the determination of the element of injury. This is the inescapable conclusion which flows from the mandate in 19 U.S.C. § 1671a(b) that "a countervailing duty proceeding *shall be commenced.*" The *entire* proceeding must be commenced.

In dealing with the petition to examine its sufficiency, the ITA has a limited ministerial function. The law states that it shall determine only two things, first "whether the petition alleges the elements necessary for the imposition of a duty under section 701(a)" [19 U.S.C. § 1671(a)] and second, whether the petition "contains information reasonably available to the petitioner supporting the allegations." If it finds a lack of alleged elements or information, it may dismiss the petition. On the other hand, if the petition is sufficient, the ITA has an obligation to maintain the proceeding in a form which corresponds to the petition and effectuates the coherent purposes of the entire proceeding. This means that it must not do anything which has the effect of altering the over-all investigation by precluding, or making discretionary, that which should be mandatory. By this the Court refers to the preliminary injury determination by the ITC, which happens to be the first determination required after a petition is found sufficient. By not treating the merchandise subsidized by the EC in separate investigations the ITA left the ITC with the understandable impression that the ITC could only measure injury on the basis of the subsidized production from each country separately. This was the apparent result of the fact that the ITC preliminary injury determination is stated in section 703(a) of the Act, (19 U.S.C. § 1671b(a)) by reference to "the merchandise which is the subject of the investigation by the [ITA]." If this is related back to a self-initiated investigation by the ITA, all is well. But if it is related back to a petition-initiated investigation, an alteration by ITA of the objectives of the petition may tend to narrow the ITC's mandate.

The defendants argue that the ITC could nevertheless have made a unified injury determination for products subsidized by the EC. But this implies both that the ITC had the discretion to do so,

which is an open question,[4] and that it should have been left free to do so, which is definitely wrong. The unified consideration of injury should not be a matter of discretion when the petition alleges subsidy from a single source and that source is a country within the meaning of the law. When that occurs, the proceeding must encompass the alleged injury from all the merchandise subsidized by the country, and the ITA, in its processing of the petition, must not interfere with that objective. On the contrary, in its published announcement of the investigation it must recognize the larger implications of the form given to its subsidy investigations and take positive steps to fashion the investigations in a manner which corresponds to the full relief requested in the petition and which is in harmony with the duties of the ITC. In short, in a petition-initiated proceeding, because the operation of the statute gives the ITA determination and announcement of an investigation an apparent impact on the larger investigation, it must be done with a recognition of that impact and with a deference to the needs of the entire proceeding.

As regards the EC, this petition alleged the elements necessary for the imposition of countervailing duties and contained sufficient supporting information. No one argues otherwise and, in fact, the ITA "investigation" of EC subsidies is an acknowlegement that the petition was sufficient. Nevertheless, defendants claim that the ITA had discretion to determine whether the EC should be considered a country for the purpose of countervailing duty investigations. This arises from a misunderstanding of a statutory definition whose primary purpose, ironically, was to make it clear that customs unions are subject to the countervailing duty law in *all* respects. Section 771(3) of the Act (19 U.S.C. § 1677(3)) defines the term "country" for the purposes of countervailing duty proceedings as follows:

> The term "country" means a foreign country, a political subdivision, dependent territory, or possession of a foreign country, and, except for the purpose of antidumping proceedings, may include an association of two or more foreign countries, political subdivisions, dependent territories, or possessions of countries into a customs union outside the United States.

The defendants seize on the use of the phrase "*may* include" as indicative of a grant of discretion to the ITA and join to it a sentence from the legislative history in which it is stated that "the administering authority will determine, on the basis of the facts in each case, what entity or entities will be considered the 'country' for the purposes of a title VII proceeding." S. Rep. 96–249, 96th Cong. 1st Sess. 81 (1979).

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[4] This is an issue in a pending action for judicial review of negative preliminary injury determinations by the ITC. *United States Steel Corporation* v. *United States, et al.*, Consolidated Court No. 82–3–00288. (U.S.C.I.T. filed March 3, 1982)

This argument comes to naught however, when, in the next paragraph of the legislative history, a far more direct indication of intention is found as follows:

> In countervailing duty proceedings, a subsidy granted by a political subdivision of a foreign country, such as a province or a development authority, *or by an institution of a customs union, will be considered to be granted by a "country." Thus, the European Communities, as well as each of its member states, is a country for purposes of countervailing duty proceedings.* [emphasis supplied]

More need hardly be said on the subject other than to point out that the legislative history relied on by the defendant to determine what entity will be the country for the purpose of a countervailing duty proceeding, obviously does not envision more than selection of that entity which best suits the objectives of the investigation when there is a genuine possibility of unnecessary duplication or when the status of an entity is uncertain. One example might be when producers are alleged to receive subsidies from a provincial or state government as well as subsidies from a central government. Since all of these can be considered countries, it is proper to select one as the "country," if by so doing, all the allegations of the petition can thereby be accommodated. On the other hand, in this case the selection of the individual member states of the EC as the "countries" did not accommodate the fact that injuries were alleged as a result of the *entire* EC production of the products subsidized by the EC, and did not fully recognize that the EC was itself a country under the law. What the ITA did went beyond any conceivable grant of discretion and amounted to an unjustified exclusion of a named country from a proceeding. Stated differently, the ITA may have ascertained the EC subsidies but it also jeopardized a corresponding evaluation of the injury caused by the EC subsidies, unimpeded by national boundaries.

For these reasons, the Court will require the initiation by the ITA of separate investigation of the EC, to be done in the same manner as the investigations of individual nations. These investigations, by virtue of being directed at the EC as the country providing certain subsidies, will, to that extent, require the ITC to consider the EC subsidized products as unitary causes of injury or threat of injury.

Plantiffs have also brought this action to obtain judicial review of the dismissal of their petition insofar as it asked for countervailing duties with respect to four types of steel bars from the Netherlands, one type from Luxembourg and, insofar as it asked for antidumping duties with respect to hot and cold rolled carbon steel sheet from Romania.

The reason given for the steel bar dismissals was that there had been no, or only *de minimis,* imports of those products in recent years and therefore the statutory standard in the countervailing

duty law, that there be "a subsidy with respect to * * * merchandise imported into the United States * * *" was not met.

The reason given for the steel sheet dismissal was that there had been no, or only *de minimis*, imports of those products in recent years, no evidence of bona fide offers on merchandise for export to the United States and therefore, no adequate allegation had been made of one of the two statutory prerequisites for the imposition of antidumping duty, i.e., that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value.

If the steel bar dismissals are taken at face value, they appear to be decisions on the merits as to the existence of a subsidy, which would be palpably improper at a stage when the ITA is only determining the sufficiency of a petition.

If they are viewed as a comment on the sufficiency of the petition, i.e., that claims of subsidy are not sufficiently alleged when there are no or *de minimis* importations, they are wrong for other reasons, which can be discussed together with the steel sheet dismissals. The latter dismissals stated that the consequence of no or *de minimis* importations in an antidumping case was an inadequate allegation of sales at less than fair value or likelihood of sales at less than fair value. In all instances these dismissals may be considered as based on the proposition that in circumstances where *no* or *de minimis* imports have been made in recent years the element of subsidy or sales, or likelihood of sales, at less than fair value cannot be sufficiently alleged in a petition for the imposition of countervailing or antidumping duties.

As a general proposition, this statement does not accord with the law because it ignores the fact that in cases of threat such as these, the quantity of recent imports may be irrelevant to the assessment of countervailing or antidumping duties. In the case of countervailing duties, under 19 U.S.C. § 1671 [8] they may be assessed if an industry in the United States is only threatened with material injury from subsidized merchandise. Antidumping duties, under 19 U.S.C. § 1673,[9] may be assessed on a basis which is even more anticipatory

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[8] § 1671. Countervailing duties imposed.
(a) General rule. If—
(1) the administering authority determines that—
(A) a country under the Agreement, or
(B) a person who is a citizen or national of such a country, or a corporation, association, or other organization organized in such a country,
is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise imported into the United States, and
(2) the Commission determines that—
(A) an industry in the United States—
(i) is materially injured, or
(ii) is threatened with material injury, or
(B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise,
then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net subsidy.

[9] § 1673. Antidumping duties imposed.
If—
(1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
(2) the Commission determines that—

Continued

than countervailing duties, in that both the injury *and* the cause of injury (sales at less than fair value) can be of a projected nature.

Even if the recent level of importation had some relevance to the nature of the alleged injury, as in a claim of present material injury, it would be improper for the ITA to utilize a *de minimis* test for two additional reasons. First, the concept of *de minimus* was not developed, and is not properly used, to evaluate pleadings. It is used in the later application of the law to the facts, as is exemplified in the facts of the very case cited by defendants in support of the ITA's use of *de minimis* in determining the sufficiency of a petition. *Carlisle Tire and Rubber Co.* v. *U.S.*, 2 C.I.T. — 517 F. Supp. 704, 706 (1981).

The law does not concern itself with trifles when it *knows* that they are trifles. It cannot know that from the complaint or petition without anticipating and subverting later stages of the administrative or judicial process. As noted earlier, the ITA's role in determining the sufficiency of a petition is a limited one.

Secondly, and related to the first point, by reaching a conclusion that a given level of importation was *de minimis*, the ITA usurped the role of the ITC whose duty it is to gauge whether the levels of importation have any meaningful effect. See S. Rep. 96-249, 96th Cong., 1st Sess. 86, 87 (1979). This also answers a related argument by defendants that the ITA was acting here in conformity with the requirements of certain international agreements [10] that these investigations not be initiated without simultaneous consideration of evidence of the existence of both subsidy and injury, or that they be terminated as soon as it is found that there is not sufficient evidence of dumping, or that the volume of dumped imports, actual or potential, is negligible.

Congress has explicitly enacted this legislation to conform to trade agreements entered into by the United States and has defined those procedures which constitute conformity in the initiation of investigations. Thus, the petition determination by the ITA *and* the preliminary injury determination by the ITC were considered together to implement the code requirement that before a countervailing duty investigation is initiated the existence of a subsidy and injury must be considered. S. Rep. 96-249, 96th Cong., 1st Sess. 49 (1979). The ITA's first duty in determining the sufficiency of a petition is to adhere to the procedures contained in the law and not to

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(A) an industry in the United States—
(i) is materially injured, or
(ii) is threatened with material injury, or
(B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise,
then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise.

[10] Specifically, defendants refer to provisions in two agreements, approved under section (2)(a) of the Trade Agreements Act of 1979, Pub. L. 96-317, namely, The Agreement on Interpretation and Arbitration of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (GATT) (relating to subsidies and countervailing measures) and The Agreement on Implementation of Article VI of the GATT (relating to antidumping measures).

assume a larger responsibility by looking beyond the law to the codes or trade agreements it implements.

In the Court's view the petition and supporting material submitted during the 20-day period contained sufficient allegations and information to warrant the initiation of investigations of threatened injury. These included allegations of existing and recently expanded capacity, ability to shift from one product to another, the existence of economic incentives to export and reasons for exports to be focused on the United States. The underlying merits of these allegations may be reached in the course of the investigations, not in the determination of the sufficiency of the petition.

These laws embody a distinct encouragement to the commencement of investigations, even to the point of expecting the ITA to advise and assist private parties before they file a petition. The legislative history also makes the analogy between the requirements of these petitions and those needed to make out a cause of action for purposes of civil litigation. Even a rough analogy is sufficient to indicate that petitions should not be dismissed except for notable deficiencies. See H.R. Rep. No. 96-317, 96th Cong., 1st Sess. 51 (1979). See also, S. Rep. No. 96-249, 96th Cong., 1st Sess. 47 (1979).

For the reasons discussed above, the Court finds that the actions of the ITA in not initiating separate investigations of the EC and in dismissing the petition insofar as it related to the steel bars and steel sheets previously discussed, were not in accordance with the law.[11] The Court finds that the petitions were sufficient to justify investigations in all these matters.

It is therefore ordered that the ITA initiate investigations with respect to the products described in plaintiff's petition in conformity with this Opinion.

(Slip Op. 82-59)

CARDINAL GLOVE CO., INC., PLAINTIFF *v.* THE UNITED STATES, DEFENDANT

Court No. 82-4-00501

Before BOE, *Judge.*

Country of Exportation

[Judgment on stipulated facts and accompanying exhibits, for plaintiff.]

(Decided July 22, 1982)

Sharretts, Paley, Carter & Blauvelt, P.C. (*Gail T. Cumins, Ned H. Marshak* and *Peter Jay Baskin* on the briefs), for the plaintiff.

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[11] In view of the Court's finding that the dismissals were not in accordance with the law it does not reach plaintiffs' argument that they were also tainted by impermissible *ex parte* communications.

J. Paul McGrath, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, (*Susan Handler-Menahem* on the brief) for the defendant.

BOE, *Judge:* In the above-entitled action the subject merchandise, cotton gloves assembled in Haiti from "panels" manufactured in Hong Kong, has been denied entry into the United States by the Customs Service because of the lack of an export license and/or visa as required by the bilateral textile agreement between Hong Kong and the United States.

The parties have submitted this action to the court for determination upon a stipulation of facts which provide:

> 1. This court has jurisdiction over this Civil Action pursuant to 28 U.S.C. § 1581(a).
>
> 2. The merchandise the subject of this Civil Action consists of cotton gloves, properly classifiable in item 704.45, Tariff Schedules of the United States (TSUS), as 'gloves not of lace or net and not ornamented, and glove linings, of vegetable fibers, made from a pre-existing machine-knit or woven fabric, not woven.'
>
> 3. The accompanying sample of the imported merchandise, a finished glove, Exhibit A, is representative of the merchandise in its condition as plaintiff sought to make entry into the United States.
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> 4. The accompanying sample of the front and back panel of the glove, Exhibit B, is representative of the imported merchandise in its condition as exported from Hong Kong to Haiti.
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> 5. The cotton fabric from which the imported gloves were manufactured was produced in Hong Kong.
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> 6. This fabric was cut in Hong Kong into front and back panels.
>
> 7. The front and back panels were shipped from Hong Kong to Haiti.
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> 8. The front and back panels were assembled in Haiti by being sewn together with thread manufactured in the United States.
>
> 9. The gloves were then turned inside out, pressed, inspected, paired, folded and bundled in Haiti.
>
> 10. The gloves were shipped from Haiti to the United States.
>
> 11. At the time the glove panels were exported from Hong Kong, the plaintiff intended that the gloves assembled in Haiti from the glove panels would be imported into the United States.
>
> 12. The assembly of the glove panels was the only procedure for which the glove panels went to Haiti.
>
> 13. The gloves were never sold or offered for sale for consumption in Haiti.
>
> 14. The merchandise such as Exhibit B is sold in the United States glove trade as unassembled gloves, tranks or panels.

15. The Customs Service decision to deny entry of these gloves was because the entry was not accompanied by a Hong Kong export license.

16. The Customs Service decision to deny entry was based on a determination that the merchandise in issue was subject to a bilateral textile agreement between the United States and Hong Kong.

The current bilateral textile agreement (agreement) between the United States and Hong Kong states at paragraph 4:

> During the term of the Agreement, the Government of Hong Kong shall limit annual exports from Hong Kong of cotton, wool, and man-made fiber textiles and textile products of Hong Kong origin to the United States of America, to the Aggregate, Group, Specified Limits and Sub-Limits set forth in Annex A hereto, as such limits may be adjusted in accordance with paragraphs 5, 6 and 7 * * *

The defendant contends that the subject merchandise, having been cut into component parts in Hong Kong from cotton fabric produced in Hong Kong and shipped after processing in an intermediate country (Haiti) to the United States, is subject to the foregoing agreement and must be accompanied by a license and/or visa from Hong Kong in order to be permitted entry into the United States.[1]

The plaintiff, however, contends that the subject merchandise, because of its assembly and processing in Haiti, is an export from Haiti for the purpose of our tariff laws and, accordingly, not subject to the agreement and the licensing provisions contained therein between Hong Kong and the United States.

Various descriptive terms are used in the agreement referring to the products and materials which, upon exportation from Hong Kong to the United States, are subject to limitation and licensing requirements.[2] However, in considering the applicability of the provisions of the agreement to the instant action, the initial and basic question which must be addressed is whether the mercandise in *issue* presently seeking entry into the United States has been, in fact, "exported from Hong Kong to the United States." Only if the merchandise in issue has been exported from Hong Kong does the question of its origin become material with respect to the application of the agreement and its licensing provisions.

The hypothetical discussion contained in the respective memorandum briefs of counsel, as to how the merchandise in its form and condition when shipped from Hong Kong would be classified, is not relevant to the instant action. In the authorities cited by the defendant—*Doherty-Barrow of Texas, Inc.* v. *United States*, — CIT

[1] Annex D to the agreement describes the establishment of the "visa mechanism" as an "administrative arrangement."

[2] In the agreement the applicable textiles are referred to as "of Hong Kong origin," "produced in Hong Kong," and "manufactured in Hong Kong."

—, Slip Op. 82-47 (June 16, 1982); *Daisey-Heddon* v. *United States*, 66 CCPA 97, 600 F.2d 799 (1979); *Jack Bryan, Inc.* v. *United States*, 72 Cust. Ct. 197, C.D. 4541 (1974)—the issue before the court was whether the imported merchandise under Interpretative Rule 10(h), TSUS, should be properly classified as unfinished articles. Exportation of the respective merchandise therein had been made directly from Country A to the United States. No intermediate country in which processing, alteration or any change in the merchandise occurred was involved.

In the instant action the subject merchandise seeking entry into the United States consists of "gloves," properly classifiable under item 704.45, TSUS, (Stipulation of fact No. 2). No argument exists as to the finished character thereof nor with respect to the application of Interpretative Rule 10(h), TSUS. On the contrary, the sole issue presented in the instant action is a determination of the country from which the present merchandise in issue was exported.

To interpret the intent of the bilateral agreement in the manner urged by the defendant would place a grossly unfair burden upon Hong Kong. Defendant's interpretation, carried to a logical conclusion, would require that a jacket, manufactured in France from a bolt of cloth produced in and exported from Hong Kong, be accompanied by a Hong Kong visa or license, if the intention existed that the jacket be exported to the United States. Suffice it to say, the exportation of merchandise from a country producing a product to an intermediate country for the purpose of processing, manipulating or assembling that product, is a common practice in our present day industrial and technological economy. Accordingly, in ascertaining the intent of the agreement, the language therein referring to "exports from Hong Kong" must be given a construction consistent with the interpretation given to similar language in the ascertainment of the "country of exportation" in the administration of our tariff laws.

In the absence of specific statutory or regulatory authority to the contrary, therefore, the court shall adhere to the rationale and the standards adopted by prior court and customs decisions in ascertaining the country of exportation for purposes of appraising the value of imported merchandise under the Tariff Schedules of the United States.

It may be stated as a general proposition of Customs law that "[m]erchandise imported from one country, being the growth, production, or manufacture of another country, must be appraised at its value in the principal markets of the country from which immediately imported" * * * *United States* v. *G. W. Sheldon & Co.*, 53 T.D. 34, T.D. 42541 (1928). However, an intermediate country ceases to be considered the country of exportation, and the country of origin is looked upon as the country of exportation, if from the facts under determination it appears that the following tests have been met:

1. No part of the merchandise was intended for diversion into the commerce of the intermediate country;
2. None of the goods were, in fact, diverted into the commerce of the intermediate country;
3. A contingency of diversion did not exist; and,
4. None of the merchandise was in any way treated, processed, altered, manipulated or changed in character in the intermediate country.

Hospitaline, Inc. v. *United States,* 48 Cust. Ct. 563 (1962), *aff'd* 50 Cust. Ct. 556 (1963); *United States* v. *F. W. Hagemann,* 39 CCPA 182 (1952); Customs Service Decision 79-186, 13 C.S.D. 1253 (1979); *Tower & Sons* v. *United States,* 67 Treas. Dec. 1358 (1935).

From the stipulated facts it is clear that none of the merchandise was sold, or offered for sale, into the commerce of the intermediate country, Haiti. Plaintiff's intent from the beginning was to ship glove panels from Hong Kong to Haiti where they would be processed into gloves, and then shipped to the United States. There is no evidence in the record whether or not a contingency of diversion existed. The intent of the plaintiff to export the goods to the United States, as well as the stipulated facts indicate no reasonable possibility that the gloves could have been sold or offered for sale in Haiti, or elsewhere. *United States* v. *G. W. Sheldon & Co.,* 53 Treas. Dec. 34, 36 (1928); *Hospitaline, supra; T. M. Duche & Sons* v. *United States,* 49 Cust. Ct. 377 (1962).

In the opinion of the court, however, the stipulation of facts as well as an examination of Exhibits A and B [3] establish that the merchanise in issue has been assembled and processed in Haiti to an extent as to cause the cotton panels manufactured in Hong Kong to be substantially transformed into their present form.

For an intermediate country to be eliminated as the country of exportation the merchandise must not have been manipulated, treated or processed therein. Manipulation and processing of the merchandise requires more than relabeling or repacking. *Hospitaline, supra. United States* v. *Meadows, Wye & Co. Inc.,* 49 Treas. Dec. 959, T.D. 41662 (1926). In *Hospitaline,* where syringes manufactured in Japan were warehoused in Canada "as a matter of economy and convenience" but "without manipulation or change in character," the court held Japan to be the country of exportation. In *F. W. Hagemann* v. *United States,* 24 Cust. Ct. 587, *aff'd* 39 CCPA 182, (1952), the court, in holding that chemical compounds exported from Germany to the Netherlands and thence to the United States were exports from Germany, indicated that had the Dutch exporter been able to demonstrate that he had treated the compounds with additional chemicals, the product would have been deemed to have been exported from the Netherlands for U.S. appraisal purposes. In Customs Service Decision 79-186, *supra,* cus-

[3] Exhibit A is representative of the merchandise in issue, a finished glove. Exhibit B is representative of the front and back panels of the glove as manufactured in and exported from Hong Kong.

toms decided that the further treatment in Canada of hats imported from Korea, by causing patches to be heat-sealed onto the caps, sufficiently altered the merchandise to make it a product of Canada. The customs service likewise has held that sweaters assembled in Hong Kong from parts produced in Taiwan were products of Hong Kong for tariff purposes. Customs Service Decision 80–10, 14 Cust. Bull. 740 (1980). Citing *Anheuser-Busch,* 207 U.S. 556 (1907), customs found that the assembly of sweaters in Hong Kong had created a "new and different article" for tariff purposes, even though the unassembled parts would have had the same classification as the finished articles if imported into the United States altogether. 14 Cust. Bull. at 741. *See Dolliff & Co.* v. *United States,* 81 Cust. Ct. 1 (1978).

In the case at bar, the court observes that substantial processing steps have been undergone in Haiti, transforming previously unrecognizable strips of cotton cloth into cotton work gloves. These steps include: pairing of the appropriate panels, sewing the respective panels so as to form a glove into which the hand and fingers may be inserted, inversing, pressing, folding, inspecting and packaging. Completion of the foregoing procedures make the finished gloves clearly distinguishable in character and use from the component strips.[4]

In concluding that the assembly and processing of the merchandise in issue has transformed the same into an export of Haiti, the court need not be concerned with the manner of shipment of the glove panels from Hong Kong to Haiti. The court is in full agreement with decision of customs in C.S.D. 80–10, *supra,* holding that the manner of shipment from the "first" (Hong Kong) to the "second country (Haiti), in which latter country processing takes place, is not relevant to the determination of the question as to whether the first or second country is the country of exportation.

The court is not unmindful of the possibility that importers may seek to evade the restrictions contained in agreements such as the bilateral textile agreement between the United States and Hong Kong by attempting to divert products into the commerce of an intermediate country. Article 8(1) of the Multi-Fiber Agreement[5] provides that "The participating countries agree to avoid circumvention of the Arrangement by trans-shipment, re-routing, or action by non-participants." Article 8(2) thereof binds the participants to "collaborate with a view to taking appropriate *administrative* action to avoid such circumvention * * * " [Emphasis supplied.] From the foregoing provisions it is clear that attempts to circumvent the agreement are to be dealt with through administrative and diplomatic channels and not through judicial process and intervention.

[4] Accordingly, the substantial transformation undergone by the merchandise in issue in Haiti would likewise fully meet the "country of origin" test used in connection with the marking statute (19 U.S.C. § 1304), which the defendant contends is applicable herein.

[5] 25 TIAS 1002, 1011 (1973).

From the record presented for determination in this action, the court finds that Haiti is the country of exportation of the merchandise in issue. The court further finds that the bilateral textile agreement between the United States and Hong Kong is inapplicable to the stipulated facts herein and that the merchandise in issue, therefore, cannot be denied entry into the United States because of the lack of a Hong Kong export license or visa.

Let judgment be entered accordingly.

Decisions of the United States Court of International Trade

Abstracts

Abstracted Protest Decision

DEPARTMENT OF THE TREASURY, *July 26, 1982.*

The following abstracts of decisions of the United States Court of International Trade at New York are published for the information and guidance of officers of the customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to customs officials in easily locating cases and tracing important facts.

WILLIAM VON RAAB,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P82/91	Watson, J. July 13, 1982	W. Bell & Co., Inc.	80-11-00017	Item 520.61 50%	Item 765.15 Free of duty	Agreed statement of facts	Baltimore Merchandise marked with asterisk on appendix A attached to decision and judgment
P82/92	Watson, J. July 13, 1982	Elliot International, Inc.	79-5-00827	Item 706.24 20%	Item 706.23 6.5%	Agreed statement of facts	New York Handbags and linen handbags
P82/93	Watson, J. July 13, 1982	Mustang Electronics, Inc. et al.	76-1-00286, etc.	Item 685.21 or 685.23 10.4%	Item 685.25, 685.28, or 685.29 6%	Audiovox Corp. v. U.S. (Slip Op. 81-11, January 27, 1981)	New York FM converters, etc.
P82/94	Watson, J. July 13, 1982	North American Foreign Trading Corp.	80-5-00767	Item 676.20 5%	Item A676.20 Free of duty pursuant to GSP	Agreed statement of facts	New York Calculating machines; products of an eligible beneficiary country
P82/95	Watson, J. July 13, 1982	Shell Oil Company	77-8-02288, etc.	Item 430.00 5%	Item 475.65 0.25 cents per gallon	Agreed statement of facts	New Orleans Olefins
P82/96	Maletz, J. July 13, 1982	Dan Dee Imports, Inc.	80-3-00412, etc.	Item 737.80 22%	Item 725.50 8%	Amico Inc. v. U.S. (C.A.D. 1214)	New York Music boxes
P82/97	Newman, J. July 13, 1982	Audiovox Corp.	79-10-01498, etc.	Item 685.21 or 685.23 10.4% (merchandise marked "A" and "B")	Item 685.25, 685.28, or 685.29 Duty free pursuant to GSP (merchandise marked "A") 6% (merchandise marked "B")	Audiovox Corp. v. U.S. (Slip Op. 81-11, January 27, 1981)	Los Angeles Converters; products of eligible beneficiary country
P82/98	Newman, J. July 13, 1982	Optical Imports, Inc.	81-11-01561	Item 708.23 12.5%	Item 685.10 6%	Rank Precision Industries, Inc. v. U.S. (C.A.D. 1269)	New York Motorized television lens system

P82/99	Watson, J. July 14, 1982	H. E. Lauffer Co., Inc.	74-9-02410, etc.	Item 533.66 10 cents per doz. pcs. + 36% Item 533.65 10 cents per doz. pcs. + 55%	Item 533.28 5 cents per doz. pcs. + 10.5% Item 533.26 10 cents per doz. pcs. + 21%	Agreed statement of facts	New York Ceramic articles
P82/100	Newman, J. July 14, 1982	New York Merchandise Co., Inc.	81-1-00104	Item 683.80 13.75%	Item 688.40 5.5%	New York Merchandise Co., Inc. v. U.S. (Slip Op. 81-24, March 12, 1981)	Los Angeles Battery operated fountain lights, etc.
P82/101	Newman, J. July 14, 1982	Philipp Overseas, Inc.	79-3-00374	Item 609.86 8.5% plus additional duties on alloy content	Item 609.82 0.1 cents per lb. + 2% plus additional duties on alloy content	Philipp Overseas, Inc. v. U.S. (C.D. 4859, aff'd, C.A.D. 1263)	New York; New Orleans; Philadelphia; Newport News Hot rolled, annealed, and pickled stainless steel angles
P82/102	Newman, J. July 14, 1982	Philipp Overseas, Inc.	80-10-01803	Item 609.86 8.5% plus additional duties on alloy content	Item 609.82 0.1 cents per lb. + 2% plus additional duties on alloy content	Philipp Overseas, Inc. v. U.S. (C.D. 4859, aff'd, C.A.D. 1263)	Baltimore; Philadelphia Hot rolled, annealed, and pickled stainless steel angles
P82/103	Newman, J. July 14, 1982	Rank Precision Industries, Inc.	77-9-03895	Item 708.23 12.5%	Item 685.10 6%	Rank Precision Industries, Inc. v. U.S. (C.A.D. 1269)	Los Angeles Varotal assemblies
P82/104	Ford, J. July 15, 1982	Special Nutrients, Inc.	79-12-01788	Item 184.75 7.5%	Item 470.85 4%	Joseph F. Hendrix, a/c Productos Deshidratados de Mexico, S.A. v. U.S. (C.D. 4809)	Miami Marigold extract
P82/105	Watson, J. July 15, 1982	Border Brokerage Co., Inc.	80-2-00325	Item 652.35 9.5%	Item 652.18 6%	Agreed statement of facts	Blaine (Seattle) Chains
P82/106	Watson, J. July 15, 1982	Pollak Import Corp.	77-11-04727, etc.	Item 703.45 65% Item 703.55 5% plus $3.40 per doz.	Item 703.30 20% Item 703.35 4% plus $2.75 per doz.	Agreed statement of facts	New York Men's velour hat bodies and capelines
P82/107	Newman, J. July 15, 1982	Uniroyal, Inc.	80-10-01801	Item 657.25 9%	Item 772.65 3.9%	Uniroyal, Inc., c/o A. N. Deringer, Inc. v. U.S. (Abs. No. P80/59)	Champlain-Rouses Point (Ogdensburg) Rubber hose, pipe, or tubing with attached fittings

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P82/108	Landis, J. July 19, 1982	Uniroyal, Inc.	79-12-01837, etc.	Item 680.12 or 678.35 5.5%	Item 680.11 Free of duty	Uniroyal, Inc. v. U.S. (Court No. 80-6-00946)	New York Desma 714 footwear molds
P82/109	Watson, J. July 19, 1982	All Channel Products	81-4-00382-S	Item 685.90 8.5%	Item 685.20 5% Item 685.19 4.8%	All Channel Products Corp. v. U.S. (Slip Op. 81-8, January 16, 1981)	New York Parts of television apparatus
P82/110	Watson, J. July 19, 1982	All Channel Products	81-5-00567	Item 685.90 8.1% (merchandise marked "A") Item 685.18 5% (merchandise marked "B")	Item 685.20 5% (merchandise marked "A") Item 685.19 4.8% (merchandise marked "B")	All Channel Products Corps. v. U.S. (Slip Op. 81-8, January 16, 1981)	New York Parts of television apparatus
P82/111	Watson, J. July 19, 1982	Coleco Industries, Inc.	81-5-00512	Item 685.90 8.5%	Item A685.90 Free of duty pursuant to Generalized System of Preferences	Agreed statement of facts	New York Control panels for the Coleco Quiz game
P82/112	Watson, J. July 19, 1982	Mast Industries, Inc.	81-5-00558	Item 382.00 35%	Item 382.00 21%	Agreed statement of facts	Los Angeles Shirts, style No. HS-944
P82/113	Maletz, J. July 19, 1982	International Seaway Trading Corp.	69/30711	Item 700.60 20%	Item 700.70 15%, 13%, 12%, 10%, 9%, or 7.5%	International Seaway Trading Corp. v. U.S. (C.D. 4773)	Houston Footwear
P82/114	Maletz, J. July 19, 1982	International Seaway Trading Corp.	70/11479	Item 700.60 20%	Item 700.70 12%	International Seaway Trading Corp. v. U.S. (C.D. 4773)	Houston Footwear
P82/115	Newman, J. July 20, 1982	New York Merchandise Co., Inc.	75-5-01054	Item 683.80 13.75%	Item 688.40 5.5%	New York Merchandise Co., Inc. v. U.S. (Slip Op. 81-24, March 12, 1981)	Los Angeles Battery operated fountain lights, etc.

P82/116	Newman, J. July 20, 1982	Philipp Overseas, Inc.	79-4-00636	Item 609.86 8.5%	Item 609.82 0.1¢ per lb. plus 2% plus additional duties on alloy content	Philipp Overseas, Inc. v. U.S. (C.D. 4859, aff'd C.A.D. 1263)	Baltimore Hot rolled, annealed and pickled stainless steel angles
P82/117	Newman, J. July 20, 1982	Philipp Overseas, Inc.	80-3-00535, etc.	Item 609.86 8.5%	Item 609.82 0.1¢ per lb. plus 2% plus additional duties on alloy content	Philipp Overseas, Inc. v. U.S. (C.D. 4859, aff'd, C.A.D. 1263)	Baltimore Hot rolled, annealed and pickled stainless steel angles

Decisions of the United States Court of International Trade

Abstracts

Abstracted Reappraisement Decisions

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R82/440	Re, C.J. July 13, 1982	Koniphoto Corp.	74-2-00438	Cost of production or Export value (as listed in decision and judgment)	As enumerated in decision and judgment for items appraised on basis of cost of production; appraised unit values less additions included to reflect currency revaluation for items appraised on basis of export value	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Miscellaneous articles
R82/441	Re, C.J. July 13, 1982	Mitsui & Co. (USA), Inc.	74-2-00395	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation, with exception of entries for which dutiable values are shown in decision and judgment	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York; Philadelphia; Baltimore; Los Anagles; New Orleans; San Francisco; Boston; Cleveland; Seattle; Charleston, S.C.; Detroit; Portland, Oreg. Not stated

R82/442	Re, C.J. July 13, 1982	Ziel & Co., Inc.	R61/18013	Export value	Net appraised value less 7½% thereof, net packed	U.S. v. Getz Bros. & Co., et al. (C.A.D. 927)	Los Angeles Plywood
R82/443	Rao, J. July 13, 1982	F. W. Myers (Atlantic) & Co., Inc.	80-3-00472	Constructed value	$17.02 each, packed, less ocean freight and insurance	F. W. Myers (Atlantic) & Co., Inc. v. U.S. (Court No. 79-11-01749, July 14, 1980) wherein merchandise was held properly classifiable under item 683.50, TSUS	New York Electric shavers
R82/444	Watson, J. July 13, 1982	King's Department Stores, Inc.	81-5-00560	Export value	Invoiced unit values, net packed, per pair	Agreed statement of facts	Boston Footwear
R82/445	Watson, J. July 13, 1982	Mast Industries	79-6-01046, etc.	Constructed value	Invoice unit values	Agreed statement of facts	New York Wearing apparel
R82/446	Watson, J. July 13, 1982	Mitsubishi International Corp.	80-12-00144	Export value	Invoiced f.o.b. prices plus 3%, net packed	Agreed statement of facts	Los Angeles Men's and boys' footwear
R82/447	Watson, J. July 13, 1982	Topp Electronics, Inc.	78-12-02126	Constructed value	Values specified on entry papers by liquidating officer excluding one-half of amount added for assists set forth in schedule of protests attached to decision and judgment	Agreed statement of facts	Los Angeles Not stated
R82/448	Re, C. J. July 14, 1982	Amerex Trading Corp.	73-7-02115	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco; New Orleans; Los Angeles; Miami; Boston Miscellaneous articles
R82/449	Re, C.J. July 14, 1982	Chain Bike Corp.	74-8-02106	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York; Philadelphia; San Francisco; Los Angeles Miscellaneous articles
R82/450	Re, C.J. July 14, 1982	Matton & Co., Inc., a/c J. E. Higgins Lumber, et al.	R60/16761, etc.	Export value	Net appraised value less 7½% thereof, net packed	U.S. v. Getz Bros. & Co. et al. (C.A.D. 927)	San Francisco Plywood
R82/451	Re, C.J. July 14, 1982	The May Dept. Stores Co	78-5-00934	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Miscellaneous articles

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R82/452	Re, C.J. July 14, 1982	Starlight Trading, Inc.	75-9-02247	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Los Angeles; New York Miscellaneous articles
R82/453	Re, C.J. July 14, 1982	Ziel & Company, Inc.	R58/25059, etc.	Export value	Net appraised value less 7½% thereof, net packed	U.S. v. Getz Bros. & Co. et al. (C.A.D. 927)	Los Angeles Plywood
R82/454	Re, C.J. July 14, 1982	Ziel & Company, Inc.	R59/04118	Export value	Net appraised value less 7½% thereof, net packed	U.S. v Getz Bros. & Co. et al. (C.A.D. 927)	Portland, Oreg. Plywood
R82/455	Maletz, J. July 14, 1982	Jimbar Corp.	72-11-02220	Export value	$7.40 (merchandise marked "A") $7.54 (merchandise marked "B")	International Seaway Trading Corp. (C.D. 4773) wherein merchandise was classifiable under item 700.70, TSUS)	San Juan Boat shoes
R82/456	Newman, J. July 14, 1982	Holly Stores, Inc.	77-12-04914	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel, etc.
R82/457	Watson, J. July 15, 1982	Conti Rubber Products Inc.	75-9-02456-S	Foreign value	Claimed unit values listed on schedule attached to decision and judgment	Agreed statement of facts	New York Various automotive tires
R82/458	Watson, J. July 15, 1982	Nathan Zucker Inc.	R58/7359, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	New York Artificial flowers
R82/459	Watson, J. July 15, 1982	Siber Hegner Co. Inc.	253999A, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	New York Scarves
R82/460	Watson, J. July 15, 1982	Siber Hegner Co. Inc.	256607A, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	New York Scarves
R82/461	Re, C.J. July 19, 1982	Marubeni American Corp.	74-3-00722, etc.	Export value	Unit values found by appraising customs official less ocean freight and marine insurance without additions for currency fluctuation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Miscellaneous articles

R82/462	Re, C.J. July 19, 1982	Spartans Industries, Div. of Arlen Realty & Develop. Corp.	74-2-00530, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Miscellaneous articles
R82/463	Watson, J. July 19, 1982	American East India Corp.	R69/4992	Export value	Invoiced f.o.b. prices specified for each article	Agreed statement of facts	Boston Footwear
R82/464	Watson, J. July 19, 1982	California Eastern Laboratories, Inc.	R62/14995	United States value	F.o.b. unit invoice prices plus 50% thereof	Agreed statement of facts	San Francisco Electron receiving tubes
R82/465	Watson, J. July 19, 1982	Conti Rubber Products	75-9-02456	Foreign value	Appropriate claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statement of facts	New York Automotive tires
R82/466	Re, C.J. July 20, 1982	W. T. Grant Co.	73-12-03385, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel, etc.
R82/467	Re, C.J. July 20, 1982	Mitsubishi International Corp.	75-10-02767	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Chicago Miscellaneous articles
R82/468	Watson, J. July 20, 1982	Nathan Zucker, Inc.	278487-A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Artificial flowers
R82/469	Watson, J. July 20, 1982	E. S. Novelty Co.	258589-A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Scarves
R82/470	Watson, J. July 20, 1982	Perkin Elmer Corporation	79-3-00493	Export value	Invoice unit prices, net, packed representing the correct dutiable values—prices represent the exporter's list prices less 35% discount	Agreed statement of facts	New York Electrical instruments and accessories

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R82/471	Watson, J. July 20, 1982	Perkin Elmer Corporation	79-12-01887	Export value	Invoice unit prices, net, packed representing the correct dutiable values—prices represent the exporter's list prices less 35% discount	Agreed statement of facts	New York Electrical instruments and accessories

International Trade Commission Notices

Investigations by the U.S. International Trade Commission

DEPARTMENT OF THE TREASURY, *August 4, 1982*

The appended notices relating to investigations by the U.S. International Trade Commission are published for the information of Customs officers and others concerned.

WILLIAM VON RAAB,
Commissioner of Customs.

In the Matter of
CERTAIN MINIATURE BATTERY-OPERATED ALL-TERRAIN WHEELED VEHICLES } Investigation No. 337-TA-122

Notice of Change of the Commission Investigative Attorney

Notice is hereby given that Robert S. Budoff, Esq. of the Unfair Import Investigations Division will be the Commission Investigative Attorney, as of this date, instead of M. Brooke Murdock, Esq.

The Secretary is requested to publish this notice in the *Federal Register.*

Dated: July 20, 1982.

DAVID I. WILSON,
Chief,
nfair Import Investigations Division.

In the Matter of
CERTAIN VACUUM BOTTLES AND COMPONENTS THEREOF } Investigation No. 337-TA-108

Notice of Termination of Respondent

AGENCY: U.S. International Trade Commission.

ACTION: Termination of investigation as to respondent Janco Industries, Inc.

SUMMARY: The Commission has terminated the above-captioned investigation as to respondent Janco Industries, Inc. (Janco), on the basis of a joint motion filed by complainant Union Manufacturing Co., respondent Janco, and the Commission investigative attorneys.

SUPPLEMENTARY INFORMATION: This investigation is being conducted under section 337 of the Tariff Act of 1930 (19 U.S.C. §1337) and concerns alleged unfair trade practices in the importation into and sale in the United States of certain vacuum bottles and components thereof. The joint motion to terminate the investigation as to Janco included an affidavit by Harry M. Kaneta, chairman of the board of Janco. In this affidavit, Mr. Kaneta stated that Janco has not imported and will not import or sell the allegedly infringing vacuum bottles in the United States, unless and until there is a final decision by the Commission or a court that the vacuum bottles do not infringe complainant's trademark.

Copies of the Commission's action and order and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, telephone 202-523-0161.

FOR FURTHER INFORMATION CONTACT: William E. Perry, Esq., Office of the General Counsel, telephone 202-523-0359.

By order of the Commission.

Issued: July 20, 1982.

KENNETH R. MASON,
Secretary.

Investigation No. 701-TA-184 (Preliminary)

FROZEN CONCENTRATED ORANGE JUICE FROM BRAZIL

AGENCY: United States International Trade Commission.

ACTION: Institution of a preliminary countervailing duty investigation and scheduling of a conference to be held in connection with the Investigation.

EFFECTIVE DATE: July 14, 1982.

SUMMARY: The United States International Trade Commission hereby gives notice of the institution of an investigation under section 703(a) of the Tariff Act of 1930 (19 U.S.C. § 1671b(a)) to determine whether there is a reasonable indication that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Brazil of frozen concentrated orange juice, provided for in item 165.35 of the

Tariff Schedules of the United States, which are alleged to be subsidized by the Government of Brazil.

FOR FURTHER INFORMATION CONTACT: Mr. David Coombs (202-523-1376), Office of Investigations, U.S. International Trade Commission.

SUPPLEMENTARY INFORMATION:

Background.—This investigation is being instituted in response to a petition filed July 14, 1982 on behalf of the Florida Citrus Mutual of Lakeland, Florida. A copy of this petition is available for public inspection in the Office of the Secretary, U.S. International Trade Commission, 701 E Street, NW., Washington, D.C. The Commission must make its determination in this investigation within 45 days after the date of the filing of the petition or by August 30, 1982 (19 CFR § 207.17). Persons wishing to participate in this investigation as parties must file an entry of appearance with the Secretary to the Commission, as provided for in section 201.11 of the Commission's Rules of Practice and Procedure (19 CFR § 201.11), not later than seven (7) days after the publication of this notice in the *Federal Register.* Any entry of appearance filed after this date will be referred to the Chairman, who shall determine whether to accept the late entry for good cause shown by the person desiring to file the notice.

Service of documents.—The Secretary will compile a service list from the entries of appearance filed in this investigation. Any party submitting a document in connection with the investigation shall, in addition to complying with section 201.8 of the Commission's rules (19 CFR § 201.8), serve a copy of each such document on all other parties to the investigation. Such service shall conform with the requirements set forth in section 201.16(b) of the rules (19 CFR § 201.16(b)).

In addition to the foregoing, each document filed with the Commission in the course of this investigation must include a certificate of service setting forth the manner and date of such service. This certificate will be deemed proof of service of the document. Documents not accompanied by a certificate of service will not be accepted by the Secretary.

Written submissions.—Any person may submit to the Commission on or before August 16, 1982, a written statement of information pertinent to the subject matter of this investigation (19 CFR § 207.15). A signed original and fourteen (14) copies of such statements must be submitted (19 CFR § 201.8).

Any business information which a submitter desires the Commission to treat as confidential shall be submitted separately, and each sheet must be clearly marked at the top "Confidential Business Data." Confidential submissions must conform with the requirements of section 201.6 of the Commission's rules (19 CFR § 201.6).

All written submissions, except for confidential business data, will be available for public inspection.

Conference.—The Director of Operations of the Commission has scheduled a conference in connection with this investigation for 9:30 a.m., on August 10, 1982, at the U.S. International Trade Commission Building, 701 E Street NW., Washington, D.C. Parties wishing to participate in the conference should contact the supervisory investigator for the investigation, Mr. Lynn Featherstone, telephone 202-523-0242, not later than August 5, 1982, to arrange for their appearance. Parties in support of the imposition of countervailing duties in this investigation and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference.

For further information concerning the conduct of this investigation and rules of general application, consult the Commission's Rules of Practice and Procedure, part 207, subparts A and B (19 CFR part 207, 47 F.R. 6182, February 10, 1982), and part 201, subparts A through E. (19 CFR part 201, 47 F.R. 6182, February 10, 1982). Further information concerning the conduct of the conference will be provided by Mr. Featherstone.

This notice is published pursuant to section 207.12 of the Commission's rules (19 CFR § 207.12).

Issued: July 21, 1982.

KENNETH R. MASON,
Secretary.

In the Matter of
CERTAIN CUBE PUZZLES } Investigation No. 337-TA-112

Notice of Change of the Commission Investigative Attorney

Notice is hereby given that Oreste Russ Pirfo, Esq. of the Unfair Import Investigations Division will be the Commission investigative attorney, as of this date, instead of M. Brooke Murdock, Esq.

The Secretary is requested to publish this notice in the *Federal Register.*

Dated: July 22, 1982.

DAVID I. WILSON,
Chief,
Unfair Import Investigations Division.

Investigations Nos. 701-TA-148 through 150 (Final)

CARBON STEEL WIRE ROD FROM BELGIUM, BRAZIL, AND FRANCE

AGENCY: United States International Trade Commission.

ACTION: Institution of final countervailing duty investigations and scheduling of a hearing to be held in connection with the investigations.

EFFECTIVE DATE: July 14, 1982.

SUMMARY: As a result of affirmative preliminary determinations by the United States Department of Commerce that there is a reasonable basis to believe or suspect that the Governments of Belgium, Brazil, and France are providing, directly or indirectly, subsidies with respect to the manufacture, production, or exportation of carbon steel wire rod within the meaning of section 701 of the Tariff Act of 1930 (19 U.S.C. § 1671), the United States International Trade Commission hereby gives notice of the institution of the following investigations under section 705(b) of the Act (19 U.S.C. § 1671d(b)) to determine whether an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of carbon steel wire rod, provided for in item 607.17 of the Tariff Schedules of the United States, from—

Belgium (investigation No. 701–TA–148 (Final)),
Brazil (investigation No. 701–TA–149 (Final)), and
France (investigation No. 701–TA–150 (Final)).

Carbon steel wire rod is defined as a coiled, semifinished, hot-rolled carbon steel product of approximately round, solid cross section not under 0.20 inch nor over 0.74 inch in diameter, not tempered, not treated, and not partly manufactured, and valued over 4 cents per pound.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen Miller (202–523–0305), Office of Investigations, U.S. International Trade Commission.

SUPPLEMENTARY INFORMATION:

Background.—On March 25, 1982, the Commission determined, on the basis of the information developed during the course of its preliminary investigations, that there was a reasonable indication that an industry in the United States was materially injured or threatened with material injury by reason of allegedly subsidized imports of carbon steel wire rod from Belgium, Brazil, and France. The preliminary investigations were instituted in response to petitions filed on February 8, 1982, by seven U.S. producers of carbon steel wire rod. The Department of Commerce will make its final subsidy determinations in these cases on or before September 21, 1982. The Commission must make its final injury determinations in the investigations within 120 days after the date of Commerce's preliminary subsidy determinations or by November 12, 1982 (19 CFR § 207.25). A public version of the staff report containing preliminary findings of fact will be placed in the public record on Sep-

tember 1, 1982, pursuant to section 207.21 of the Commission's Rules of Practice and Procedure (19 CFR § 207.21).

Hearing.—The Commission will hold a hearing in connection with these investigations beginning at 10:00 a.m., e.d.t., on September 23, 1982, at the U.S. International Trade Commission Building, 701 E Street, NW., Washington, D.C. 20436. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission not later than the close of business (5:15 p.m.) on August 31, 1982. All persons desiring to appear at the hearing and make oral presentations may file prehearing briefs and should attend a prehearing conference to be held at 9:30 a.m., e.d.t., on September 8, 1982, in Room 117 of the U.S. International Trade Commission Building. Prehearing briefs must be filed on or before September 16, 1982.

Testimony at the public hearing is governed by section 207.23 of the Commission's Rules of Practice and Procedure (19 CFR § 207.23, as amended, 47 F.R. 6191). This rule requires that testimony be limited to a nonconfidential summary and analysis of material contained in prehearing briefs and to new information. All legal arguments, economic analyses, and factural materials relevant to the public hearing should be included in prehearing briefs in accordance with rule 207.22 (19 CFR § 207.22, as amended, 47 F.R. 6191). Posthearing briefs must conform with the provisions of rule 207.24 (47 F.R. 6191) and must be submitted not later than the close of business on October 6, 1982.

Written submissions.—Any person may submit to the Commission a written statement of information pertinent to the subject of these investigations. A signed original and fourteen (14) true copies of each submission must be filed with the Secretary to the Commission on or before October 6, 1982. All written submissions except for confidential business data will be available for public inspection.

Any business information for which confidential treatment is desired shall be submitted separately. The envelope and all pages of such submissions must be clearly labeled "Confidential Business Information." Confidential submissions and requests for confidential treatment must conform with the requirements of section 201.6 of the Commission's Rules of Practice and Procedure (19 CFR § 201.6).

Service of documents.—Any interested person may appear in these investigations as a party, either in person or by representative, by filing an entry of appearance with the Secretary in accordance with section 201.11 of the Commission's rules (19 CFR § 201.11, as amended, 47 F.R. 6189). Each entry of appearance must be filed with the Secretary no later than 21 days after the publication of this notice in the *Federal Register.*

The Secretary will compile a service list from the entries of appearance filed in these final investigations and from the Commission's record in the preliminary investigations. Any party submit-

ting a document in connection with these investigations shall, in addition to complying with section 201.8 of the Commission's rules (19 CFR § 201.8, 41 F.R. 17710, as amended 47 F.R. 6188, and 47 F.R. 13791), serve a copy of each such document on all other parties to the investigations. Such service shall conform with the requirements set forth in section 201.16(b) of the rules (19 CFR § 201.16(b) as amended, 47 F.R. 6190).

In addition to the foregoing, each document filed with the Commission in the course of these investigations must include a certificate of service setting forth the manner and date of such service. This certificate will be deemed proof of service of the document. Documents not accompanied by a certificate of service will not be accepted by the Secretary.

For further information concerning the conduct of the investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 207, subparts A and C (19 CFR § 207, 44 F.R. 76457 as amended in 47 F.R. 6190 and 47 F.R. 12792) and part 201, subparts A through E (19 CFR § 201).

This notice is published pursuant to section 207.20 of the Commission's Rules of Practice and Procedure (19 CFR § 207.20).

By order of the Commission.

Issued: July 22, 1982.

KENNETH R. MASON,
Secretary.

Investigation No. 701-TA-185 (Preliminary)

FIREPLACE MESH PANELS FROM TAIWAN

AGENCY: United States International Trade Commission.

ACTION: Institution of a preliminary countervailing duty investigation and scheduling of a conference to be held in connection with the investigation.

EFFECTIVE DATE: July 20, 1982.

SUMMARY: The United States International Trade Commission hereby gives notice of the institution of an investigation under section 703(a) of the Tariff Act of 1930 (19 U.S.C. § 1671b(a)) to determine whether there is a reasonable indication that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Taiwan of fireplace mesh panels, provided for in items 642.87 or 654.00 of the Tariff Schedules of the United States, which are alleged to be subsidized by the Government of Taiwan.

FOR FURTHER INFORMATION CONTACT: Ms. Vera Libeau (202-523-0368), Office of Investigations, U.S. International Trade Commission.

SUPPLEMENTARY INFORMATION:

Background.—This investigation is being instituted in response to a petition filed July 20, 1982, on behalf of Justesen Industries, Inc. of Blaine, Washington, Pacific Fireplace Furnishings, Inc. of Taulatin, Oregon, and Fall River Fireplace Co., Inc. of Syosset, New York. A copy of this petition is available for public inspection in the Office of the Secretary, U.S. International Trade Commission, 701 E Street, NW., Washington, D.C. The Commission must make its determination in this investigation within 45 days after the date of the filing of the petition or by September 3, 1982 (19 CFR § 207.17). Persons wishing to participate in this investigation as parties must file an entry of appearance with the Secretary to the Commission, as provided for in section 201.11 of the Commission's Rules of Practice and Procedure (19 CFR § 201.11), not later than seven (7) days after the publication of this notice in the *Federal Register.* Any entry of appearance filed after this date will be referred to the Chairman, who shall determine whether to accept the late entry for good cause shown by the person desiring to file the notice.

Service of documents.—The Secretary will compile a service list from the entries of appearance filed in this investigation. Any party submitting a document in connection with the investigation shall, in addition to complying with section 201.8 of the Commission's rules (19 CFR § 201.8), serve a copy of each such document on all other parties to the investigation. Such service shall conform with the requirements set forth in section 201.16(b) of the rules (19 CFR § 201.16(b)).

In addition to the foregoing, each document filed with the Commission in the course of this investigation must include a certificate of service setting forth the manner and date of such service. This certificate will be deemed proof of service of the document. Documents not accompanied by a certificate of service will not be accepted by the Secretary.

Written submissions.—Any person may submit to the Commission on or before August 16, 1982, a written statement of information pertinent to the subject matter of this investigation (19 CFR § 207.15). A signed original and fourteen (14) copies of such statements must be submitted (19 CFR § 201.8).

Any business information which a submitter desires the Commission to treat as confidential shall be submitted separately, and each sheet must be clearly marked at the top "Confidential Business Data." Confidential submissions must conform with the requirements of section 201.6 of the Commission's rules (19 CFR § 201.6). All written submissions, except for confidential business data, will be available for public inspection.

Conference.—The Director of Operations of the Commission has scheduled a conference in connection with this investigation for 9:30 a.m., on August 12, 1982, at the U.S. International Trade Commission Building, 701 E Street NW., Washington, D.C. Parties wishing to participate in the conference should contact the supervisory investigator for the investigation, Ms. Vera Libeau, telephone 202–523–0368, not later than August 9, 1982, to arrange for their appearance. Parties in support of the imposition of countervailing duties in this investigation and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference.

For further information concerning the conduct of this investigation and rules of general application, consult the Commission's Rules of Practice and Procedure, part 207, subparts A and B (19 CFR part 207, 47 F.R. 6182, February 10, 1982), and part 201, subparts A through E (19 CFR part 201, 47 F.R. 6182, February 10, 1982). Further information concerning the conduct of the conference will be provided by Ms. Libeau.

This notice is published pursuant to section 207.12 of the Commission's rules (19 CFR § 207.12).

Issued: July 26, 1982.

KENNETH R. MASON,
Secretary.

Investigations Nos. 731–TA–97 through 731–TA–99 (Preliminary) and Investigation No. 701–TA–186 (Preliminary)

STEEL RAILS

AGENCY: United States International Trade Commission.

ACTION: Institution of preliminary countervailing duty and antidumping investigations and the scheduling of a conference to be held in connection with the investigations.

SUMMARY: The U.S. International Trade Commission hereby gives notice of the institution of investigation No. 701–TA–186 (Preliminary) under section 703(a) of the Tariff Act of 1930 (19 U.S.C. § 1671b(a)) to determine whether there is a reasonable indication that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from the European Community of steel rails, provided for in items 610.2010, 610.2020, and 610.2100 of the Tariff Schedules of the United States Annotated (1982), upon which bounties of grants are alleged to be paid.

The Commission also gives notice of the institution of investigations Nos. 731–TA–97 through 99 (Preliminary) under section 733(a) of the Tariff Act (19 U.S.C. § 1673b(a)) to determine whether there

is a reasonable indication that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from the Federal Republic of Germany, France, and the United Kingdom, of steel rails, provided for in items 610.2010, 610.2020, and 610.2100 of the Tariff Schedules, which are alleged to be sold at less than fair value.

EFFECTIVE DATE: July 22, 1982.

FOR FURTHER INFORMATION CONTACT: Mr. Bruce Cates, Office of Investigations, U.S. International Trade Commission, telephone 202-523-0369.

SUPPLEMENTARY INFORMATION:

Background.—These investigations are being instituted in response to a petition filed July 22, 1982, on behalf of CF & I Steel Corporation, Pueblo, Colorado. The Commission must make its determinations in these investigations within 45 days after the date of the filing of the petition or by September 7, 1982 (19 CFR § 207.17). The investigations will be subject to the provisions of part 207 of the Commission's Rules of Practice and Procedure (19 CFR § 207, 44 F.R. 76457), and particularly subpart B thereof.

Written submissions.—Any person may submit to the Commission on or before August 18, 1982, a written statement of information pertinent to the subject matter of the investigations. A signed original and fourteen copies of such statements must be submitted.

Any business information which a submitter desires the Commission to treat as confidential shall be submitted separately, and each sheet must be clearly marked at the top "Confidential Business Data". Confidential submissions must conform with the requirements of section 201.6 of the Commission's Rules of Practice and Procedure (19 CFR § 201.6). All written submissions, except for confidential business data, will be available for public inspection.

Service of documents.—The Secretary will compile a service list from the entries of appearance filed in this investigation. Any party submitting a document in connection with the investigation shall, in addition to complying with section 201.8 of the Commission's rules (19 CFR § 201.8), serve a copy of each document on all other parties to the investigation. Such service shall conform with the requirements set forth in section 201.16(b) of the rules (19 CFR § 201.16(b)).

In addition to the foregoing, each document filed with the Commission in the course of this investigation must include a certificate of service setting forth the manner and date of such service. This certificate will be deemed proof of service of the document. Documents not accompanied by a certificate of service will not be accepted by the Secretary.

Conference.—The Director of Operations of the Commission has scheduled a conference in connection with the investigations for

9:30 a.m., on August 13, 1982, at the U.S. International Trade Commission Building, 701 E Street, NW., Washington, D.C. Parties wishing to participate in the conference should contact the investigator for the investigations, Mr. Bruce Cates, telephone 202-523-0369, not later than August 9, 1982, to arrange for their appearance. The conference in these investigations will be held concurrently with that for countervailing duty investigation No. 701-TA-186 (Preliminary) and antidumping investigations Nos. 701-TA-97 through 731-TA-99 (Preliminary).

For further information concerning the conduct of the investigations and rules of general application, consult the Commission's Rules of Practice and Procedure, part 207, subparts A and B (19 CFR § 207 and part 201, subparts A through E (19 CFR § 201)). Further information concerning the conduct of the conference will be provided by Mr. Cates.

This notice is published pursuant to section 207.12 of the Commission's Rules of Practice and Procedure (19 CFR § 207.12).

By order of the Commission.

Issued: July 28, 1982.

KENNETH R. MASON,
Secretary.

(TA-503(a)-10 and 332-146)

PRESIDENT'S LIST OF ARTICLES WHICH MAY BE DESIGNATED OR MODIFIED AS ELIGIBLE ARTICLES FOR PURPOSES OF THE U.S. GENERALIZED SYSTEM OF PREFERENCES

AGENCY: United States International Trade Commission.

ACTION: The notice of investigation Nos. TA-503(a)-10 and 332-146, issued July 26, 1982, is hereby amended to indicate a due date of October 12, 1982, for written statements from interested parties concerning the investigation. The initial notice erroneously indicated a due date of October 5, 1982.

By order of the Commission.

Issued: July 28, 1982.

KENNETH R. MASON,
Secretary.

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